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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 305.

J. M. SHIVELY, APPELLANT,

vs.

NANCY WELCH, JOSEPH N. DOLPH, W. W. UPTON, AND JAMES W. WELCH.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

FILED MARCH 15, 1887.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, DECEMBER 21, 1889.

1 UNITED STATES OF AMERICA, } ss:
District of Oregon, }

To Nancy Welch, Joseph N. Dolph, W. W. Upton, and James W. Welch, Greeting:

Whereas John M. Shively has lately appealed to the Supreme Court of the United States from a decree rendered in the circuit court of the United States for the district of Oregon in your favor and has given the security required by law, you are therefore hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, A. D. eighteen hundred and eighty-six, to show cause, if any there be, why the said decree should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said district, this April 17, 1886.

MATTHEW P. DEADY,
U. S. District Judge, Oregon.

DISTRICT OF OREGON, ss:

Due service of the within citation upon me, as solicitor for defendants, at Portland, Oregon, on this 17th day of April, 1886, is hereby acknowledged and admitted.

E. C. BRONAUGH,
Solicitor for Defendants.

[Endorsed:] No. —. U. S. circuit court, district of Oregon. John M. Shirely, appellant, *vs.* Nancy Welch, J. N. Dolph, W. W. Upton, & James W. Welch, def'ts & appellees. Citation on appeal. Filed April 17th, 1886. —— ——, clerk, by —— ——, deputy clerk. Filed Apr. 17, 1886. R. H. Lamson, clerk.

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E. C. BRONAUGH,
Solicitor for Defendants.

[Endorsed:] No. —. U. S. circuit court, district of Oregon. —— —— *vs.* —— ——. Citation on appeal. Filed April 17, 1886. R. H. Lamson, clerk, by —— ——, deputy clerk.

2 In the Circuit Court of the United States for the District of Oregon. October Term, 1882.

Be it remembered that on the 25th day of November, 188–, there was duly filed in the circuit court of the United States for the district of Oregon a bill of complaint in words and figures as follows, to wit:

3 In the Circuit Court of the United States for the District of Oregon, in the Ninth Circuit.

To the judges of the circuit court of the United States for the district of Oregon, in the ninth circuit:

J. M. Shively, of San Francisco, a citizen of the State of California, brings this his bill against Nancy Welch and James W. Welch, both residents of the city of Astoria and citizens of the State of Oregon; J. N. Dolph, a resident of the city of Portland and citizen of the State of Oregon, and W. W. Upton, a resident of the city of Washington and a citizen of the District of Columbia; and thereupon your orator complains and says—

That in the month of March, 1844, he was occupying and claiming to hold as a settler's right the following-described tract of land or land claim, situate in the county of Clatsop and State of Oregon, namely, a certain land claim thereafter more particularly bounded and described as follows, to wit: Being parts of sections 8, 9, 16, and 17, in township 8 north, of range 9 west, being bounded and described as follows, to wit: Beginning at a point on the south bank of the Columbia river 13 chains and 13 links west and 40 chains and 24 links north from the quarter-post between said sections 9 and 16, in township 8 north, of range 9 west, thence south 97 chains; thence west 81 chains and 4 links; thence north 74 chains and 20 links to the Columbia river; thence with the meanders of said river north 28° 30′ east 3 chains 50 links; thence north 54° 39′ east 5 chains 50 links; thence north 87 east 4 chains 70 links; thence south 70 30 east 13 chains; thence south 34 45 east 7 chains 40 links; thence east 6 chains 20 links; thence north 63 30 east 7 chains; thence east 6 chains; thence north 66 east 6 chains to me-
4 ander post; thence north 43 30 east 3 chains 70 links; thence north 61 15 east 14 chains; thence north 50 15 east 19 chains 31 links to the place of beginning, containing 640.56 acres; and in

the said month he laid off a large portion of said lands bordering on the Columbia river and extending back therefrom into town lots and blocks, numbered consecutively from 1 to 121, and mapped and platted the same, calling it "plan of Astoria laid off in March, 1844," commonly known as Shively's Astoria.

Second. That on the 18th day of April, 1845, your orator, by a certain instrument in writing, under his hand and seal, bargained and sold to one James Welch all his right and title to one undivided half of said land and claim, excepting about twenty lots particularly specified in said deed.

Third. That prior to the 13th day of March, 1850, with the consent of the said James Welch, your orator added to said plat certain other blocks, numbered consecutively from 122 to 150, both inclusive, which said last-named blocks were located almost exclusively upon the shore of the Columbia river between ordinary high and low water mark.

Fourth. That on the 13th day of March, 1850, your orator and the said James Welch, believing themselves to be each the owner of an undivided half of said lands, proceeded to divide the lots and blocks between themselves, so that each should be the separate owner of his part of said tract so far as the same had been mapped and platted into blocks and lots, and for this purpose they mutually executed and delivered to each other instruments in writing under their respective hands and seals in the nature of quitclaim deeds, which, though informally drawn and executed, were then considered to be and were sufficient in law and equity to sever their respective interests in the lots and blocks then laid out so far as the same had not prior to that time been sold or conveyed; and thereafter the said James Welch had no legal or equitable right or title in or to said so-called donation land claim except as derived under said instruments in writing of the date of the 13th day of March, 1850, as hereinabove set forth and except as hereinafter expressly admitted and set forth.

Fifth. That after the passage of the act of Congress of the United States entitled "An act to create the office of surveyor general of the public lands in Oregon and to provide for the survey of and to make donation to the settlers of said public land," approved September 27th, 1850, commonly known as the Oregon donation law, your orator, who then was and for more than four consecutive years prior thereto had been personally living upon and cultivating said lands and who was a white male citizen of the United States over the age of 21 years, a married man, and in all respects qualified and entitled to claim and hold the said land as a donation claim under said act of the 27th September, 1850, became and was, with the knowledge of the said James Welch, solely recognized in the Land Office of the United States as the proper claimant of the entire tract of land.

That your orator from and after the said 27th day of September, 1850, and from and after the act of Congress of that date hereinbefore referred to and specified, was the only person entitled to claim said donation land claim under said act and the laws of the United

States; but the said James Welch continued wrongfully to claim rights in said donation land claim and contested the application of your orator for a patent to said land, and divers disputes and controversies arose between your orator and the said James Welch in relation to the validity of said agreements of the 18th day of April, 1845, and of the 13th day of March, 1850, between
6 them, hereinabove set forth, and for the purpose of settling such disputes and controversies, by putting the validity of said agreements of division of the 13th day of March, 1850, beyond question, your orator and the said James Welch, on or about the said 18th day of February, 1860, at which time your orator had completed his residence and cultivation and had become entitled to a patent from the United States for the entire donation land claim under the said act of Congress approved September 27th, 1850, entered into an agreement by which the said land was to be divided between them—that laid off in lots and blocks to be described by numbers and that portion which had not been mapped or platted into lots or blocks to be described by apt and proper boundaries; and it was further agreed that your orator, in whom the legal title was supposed to be, should, with his wife, convey to the said James Welch or to such other person as he should direct the lots, blocks, and land coming to him, whereupon, on the 18th day of February, 1860, and in order to convey to him the legal title then vested in the plaintiff, your orator, or his wife, Susan L. Shively, and to cure defects, if any, in the quitclaim deeds of the 13th day of March, 1850, and to confirm the same and without any further consideration, your orator and Susan L. Shively, his wife, executed and delivered to the said James Welch their joint deed of general warranty against all persons, the United States excepted, for the following-described real property, part and parcel of the said donation land claim hereinabove first described: The west half of that certain two-hundred-acre tract of land in the southeast corner of our land claim in township 8 north, range 9 west, in the county of Clatsop and State of Oregon, which two-hundred-acre tract is bounded and described as follows:
7 On the north by the town plat of Astoria, as laid out and recorded by John M. Shively; on the east by the east line of said land claim, on the south by the south line of said land claim, and on the west by a line parallel with the east line, so as to include two hundred acres; also the following lots and blocks in the said town plat of Astoria: Blocks 3, 7, 11, 22, 23, 27, 31, 35, 39, 45, 47, 51, 54, 58, 62, 66, 70, 74, 78, 82, 86, 89, 93, 97, 101, 107, 112, 114, 117, 118, 120, 122, 123, 124, 126, 127, 129, 130, 131, 133, 135, 136, 138, 140, 142, 144, 146, 148, 150 and lots 5 and 6, block 119; lots 5 and 6, block 134, and lots 1, 7, and 12, block 115.

And at the same time, as a part of the same transaction and for a like purpose, and for the same consideration and for none other, at the direction and upon the request of the said James Welch, your orator, with his said wife, executed and delivered to the said defendant, Nancy Welch, who was the wife of the said James Welch, a like deed of general warranty for the following-described real

property, the same being part and parcel of the said donation land claim of your orator hereinabove first described:

The east half of a certain two-hundred-acre tract of land in the southeast corner of our land claim, in township 8 north, of range 9 west, in Clatsop county, Oregon, which two-hundred-acre tract is bounded on the north by the town plat of Astoria, as laid out and recorded by said John M. Shively; on the east and south by the boundary line of our said land claim, and on the west by a line parallel with the east line, so as to include two hundred acres; also the following blocks and lots in said town plat, namely: Blocks 5, 6, 9, 13, 15, 17, 21, 25, 29, 33, 37, 41, 45, 49, 53, 56, 60, 64, 68, 72, 76, 80, 84, 88, 91, 95, 99, 105, 109.

8 That the two deeds from your orator of the 18th day of February, 1860, hereinbefore referred to, were intended to be and *was* a full settlement of all the respective parties' claims to the land claim herein first described and were so received and accepted by the said James Welch, who, in consequence, withdrew the opposition which he had previously made to the claim of plaintiff to the patent to said land.

Sixth. That the said Nancy Welch paid no consideration for the property conveyed to her, but the same was a gift from her said husband.

Seventh. That it was at the time of the division so made as aforesaid on the 18th day of February, 1860, intended by the parties to make a full and final division of all of said land claim, together with the appurtenances, including riparian rights upon the Columbia river, so that no future controversy could thereafter arise between them concerning any matter or thing growing out of their copartnership in said lands.

Eighth. That afterwards, on the 24th day of January, 1866, a patent from the United States for the said lands herein first above described issued to your orator, granting and conveying to him the east half thereof and to the said Susan L. Shively, his wife, the west half thereof.

That the lands in controversy in this suit, namely, blocks No. 111 and the west half of blocks Nos. 41, 46, & 145 of Shively's Astoria, Clatsop county, Oregon, are situated upon or in front of the west half of said claim or that portion thereof set over to Susan L. Shively by the United States patent above set forth of date January 24th, 1866.

9 That on the 7th day of March, 1871, your orator and Susan L. Shively, his wife, for a valuable consideration, by a deed duly made, executed, and delivered, conveyed to one Milton Elliot all the lands, lots, blocks, fractional lots and blocks contained or embraced in the west half of the lands patented by the United States to John M. Shively and Susan L. Shively, his wife, on the 24th day of January, 1866, and being the same lands herein first above described, save and excepting from the operation of said deeds lots Nos. 5, 6, 7, 8, and 9, in block No. 114, block No. 116, and also 55 acres of land bounded on the north by the south line of the said town of Astoria, on the west by the western boundary line as de-

scribed in said patent, on the south by the south boundary line described in said patent, and on the east by a line running due north and south to points in said southern boundary lines of said patent and the town of Astoria at a distance sufficiently far east in each of said last-named lines as to embrace 55 acres of land.

That on the 8th day of March, 1871, the said Milton Elliot, for a valuable consideration, by a deed duly made, executed, and delivered, conveyed to this plaintiff all the lands last above described and conveyed by the deed of plaintiff and wife to Milton Elliot, above set forth, whereby your orator became vested with all the right, title, and interest of the said Susan L. Shively in and to the lands set over to her by said patent of the United States to John M. Shively and wife of date January 24, 1866, excepting the lands reserved in said deed to Milton Elliot of March 7, 1871.

Ninth. That in the division of the lots and blocks aforesaid between the plaintiff, your orator, and the said James Welch the said blocks were recognized and treated each as a distinct and
10 separate tract of land, with a street for a definite exterior boundary line on all sides of the block, as indicated upon the maps and plats hereinbefore referred to, and the several blocks partitioned to the said James Welch included in the said quitclaim deed to the said James Welch of the 13th March, 1850, hereinbefore described, were so known and described, as also in the warranty deeds of February 18th, 1860, from your orator and his said wife, one to the said James Welch and the other to the said Nancy Welch, and were at the time of the making of the said several deeds of such partition noted, designated, and indicated upon the original map and plan of Astoria and the first addition thereto, and the blocks partitioned off to plaintiff were specially marked and indicated upon said map and plat by a blue shading, while those partitioned to the said James Welch were left plain.

Tenth. That block number 13, which in the deed of March 13, 1850, was assigned to the said James Welch and in the agreement of February, 1860, was assigned to the said James Welch, but was at his request conveyed to his wife, the said Nancy Welch, as is hereinbefore set forth, was represented on said map by which the division was made as an entire block, 300 feet square, bounded on the north by Wall street, on the east by West 4th street, on the south by Arch street, and on the west by West 5th street; but the same was situate partly above and partly below the line of ordinary high tide upon the bank of the Columbia river.

Eleventh. That block No. 111, which, by the deed of James Welch to your orator, was conveyed to your orator, was situate immediately in front or north of said block No. 13, and lay partly above and partly below the line of ordinary high and low tide of said
11 Columbia river, and was represented as a block of 300 feet square, bounded on the north by Cedar street, on the east by West 4th street, on the south by Wall street, and on the west by West 5th street.

Twelfth. That block number 5, which, in the deed of March 13th, 1850, was assigned to the said James Welch, and in the agreement of

February, 1860, was assigned to the said James Welch, but was at his request conveyed to his wife, the said Nancy Welch, as is hereinbefore set forth, was represented in said map, by which the division was made, as an entire block of 300 feet square, bounded on the north by Hemlock street, on the east by East 4th street, on the south by Pine street, and on the west by East 5th street, and the same was situate entirely above the line of ordinary high tide upon the bank of the Columbia river.

Thirteenth. That block No. 145, which, by the deed of James Welch to your orator was conveyed to your orator, was situate immediately in front of or north — said block No. 5 and lay partly above and partly below the line of ordinary high tide of said Columbia river, and was represented as a block 300 feet square, bounded on the north by William street, on the east by East 4th street, on the south by Hemlock street, and on the west by East 3rd street.

Fourteenth. That on the 3rd day of September, 1873, the said Nancy Welch, claiming to be entitled thereto under the act of the legislative assembly of the State of Oregon entitled "An act to provide for the sale of tide and overflowed lands on the sea shore and coast," approved October 28th, 1872, made application to the board of commissioners of the State of Oregon for the sale of school lands to purchase the tide lands lying in front of block No. 13, which included block No. 111, and also the tide lands in front of
12 block No. 5, which included blocks Nos. 145, 41, and 46, falsely representing and pretending that she was entitled to the same as appurtenant to the said blocks Nos. 5 and 13 and representing in her application and accompanying affidavit that the same were not held by any person claiming by, through, or under her or under any one through whom she claimed title, well knowing that each and every of said pretences were false and untrue, and that your orator was the equitable owner of the same and entitled to purchase the same from the State, and on or about the 28th day of August, 1876, she obtained from said board of commissioners of the school lands of the State of Oregon a deed for all the tide lands in front of said block No. 13, including said block No. 111; also all tide lands in front of the west half of block No. 5, including all tide lands in the west half of blocks Nos. 145, 41, and 46.

Fifteenth. Your orator further alleges that at the date of said application and up to and including the date of the execution of said deed by said commissioners of the State of Oregon he was an applicant in due form of law to purchase said block No. 111 and the west half of blocks Nos. 145, 41, and 46.

Sixteenth. That during all the period aforesaid from the said 13th day of March, 1850, down to and including the time when the State deed was executed to the said Nancy Welch that he was in equity the owner of said block No. 111 and the west half of blocks Nos. 145, 41, and 46, and entitled to claim and purchase the same from the State of Oregon, all of which the said Nancy Welch then and during all of said period of time well knew and of all of which she then and at all times had knowledge and due notice.

Seventeenth. That the title of the said Nancy Welch to said

block No. 111 and to all tide land north of the centre of said
13 Wall street, the north boundary of said block 13, and to all tide land lying north of the west half of block No. 5, north of the centre line of Hemlock street, the north boundary line of said block, is fraudulent and void as against your orator.

Eighteenth. That the said James W. Welch, J. N. Dolph, and W. W. Upton, on the 19th day of October, 1876, procured a deed from the said Nancy Welch each for an undivided quarter of said block No. 111 and the undivided quarter of the west half of said blocks Nos. 145, 41, and 46, and claim to hold their interest through her and not otherwise; that at the time they procured said title they paid no consideration therefor and well knew all and singular the premises, and that the said Nancy Welch had no right, title, or interest in said block No. 111 or in the west half of said blocks Nos. 145, 41, and 46, or in any of their appurtenances or to any of the tide land upon or in front of the same, and that the said conveyance from the State of Oregon was as to her with notice fraudulent and void, and that she held the legal title only for the use and benefit of your orator.

Nineteenth. That the value of the property in controversy in this suit exceeds the sum of five hundred dollars and that the same is about of the value of five thousand dollars.

Wherefore your orator prays that the said Nancy Welch, James W. Welch, J. N. Dolph, and W. W. Upton may be restrained and enjoined from proceeding at law to obtain possession of said real property or in any manner interfering with your orator's possession thereof; that your orator may be adjudged and decreed to be the equitable owner of the same; that the said Nancy Welch may be decreed to have received said deed from the State of Oregon
14 in trust for your orator, and that said Nancy Welch, James W. Welch, J. N. Dolph, and W. W. Upton be decreed to execute and deliver to your orator good and sufficient deeds conveying to your orator the title to said block No. 111 and the west half of said blocks Nos. 145, 41, and 46, and for such other and further relief as may be equitable and for his costs and disbursements.

And may it please your honors to grant unto your orator a writ of subpœna of the United States of America, issuing out of and under the seal of this honorable court, directed to the said Nancy Welch, Jas. William Welch, J. N. Dolph, and W. W. Upton, defendants, commanding them, on a day certain therein to be named and under a certain penalty, to be and appear in this honorable court, then and there to answer all and singular the premises and to stand to, perform, and abide such further order, direction, and decree as may be made against them.

And your orator in duty bound will ever pray, &c.

WILLIAM STRONG,
F. R. STRONG, AND
THOS. N. STRONG,
Solicitors for Complainant.

UNITED STATES OF AMERICA,
District of Oregon, State of Oregon, County of Clatsop, } ss:

I, J. M. Shively, being duly sworn, deposeth and saith that I am the complainant in the foregoing bill named; that I have read the same and know the contents thereof; that said bill is true of my own knowledge except as to those matters which are therein stated to be on information and belief, and as to these (?) I verily believe it to be true.

J. M. SHIVELY.

Subscribed and sworn to before me this 12 day of August, A. D. 1882.

J. O. BOZORTH,
Commissioner of the U. S. Circuit Court for the District of Oregon.

(Endorsed:) Filed November 25, 1882. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

And afterwards, to wit, on the 27th day of November, 1882, there was issued out of said court a *subpœna ad respondendum* in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

J. M. SHIVELY, Complainant,
vs.
NANCY WELCH, JAMES W. WELCH, J. N. DOLPH, and W. W. UPTON, Defendants.

No. 860. In Equity. *Subpœna ad respondendum.*

The President of the United States of America to Nancy Welch, James W. Welch, J. N. Dolph, and W. W. Upton, Greeting:

You and each of you are hereby commanded that you be and appear in said circuit court of the United States at the court-room thereof, in the city of Portland, in said district, on the first Monday of January next, which will be the first day of January, A. D. 1883, to answer the exigency of a bill of complaint exhibited and filed against you in our said court, wherein J. M. Shively is complainant and you are defendants, and further to do and receive what our said circuit court shall consider in this behalf, and this you are in nowise to omit under the pains and penalties of what may befall thereon.

And this is to command you, the marshal of said district, or your deputy, to make due service of this our writ of subpœna and to have then and there the same.

Hereof fail not.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of our said circuit court, affixed at Portland, in said district, this 27th day of November, in the year of our Lord one thousand eight hundred and eighty-

two, and of the Independence of the United States the one hundred and seventh.

[Seal United States Circuit Court, Oregon.]

R. H. LAMSON, *Clerk*,
By G. G. GAMMANS,
Deputy Clerk.

Memorandum pursuant to equity rule No. 12 of the Supreme Court of the United States.

The defendant is to enter his appearance in the above-entitled suit in the office of the clerk of said court on or before the day at which the above writ is returnable, otherwise the complainant's bill therein may be taken *pro confesso*.

[Endorsed:] No. —. In the circuit court of the United States for the district of Oregon. In equity. —— —— *vs.* —— ——. *Subpœna ad respondendum.* Returned and filed December 12, 1882. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

18 DISTRICT OF OREGON, *ss:*

I certify that the within-named defendant, W. W. Upton, cannot, after due diligence, be found within this district, and that I am credibly informed and believe that said defendant, W. W. Upton, is now at Washington City, D. C.

Portland, Oregon, December 11, 1882.

E. S. KEARNEY,
United States Marshal, District of Oregon.

19 DISTRICT OF OREGON, *ss:*

In obedience to the command of the within writ I have served the same upon the therein-named J. N. Dolph by exhibiting same to him and by delivering to him personally a true copy thereof, at Portland, in said district, on the 7th day of December, A. D. 1882.

EDWARD S. KEARNEY,
U. S. Marshal,
By JAMES BROWN, *Deputy.*

Fees, $—.

20 DISTRICT OF OREGON, *ss:*

In obedience to the command of the within writ I have served the same upon the therein-named James W. Welch by exhibiting same to him and by delivering to him personally a true copy thereof, duly certified to by me as U. S. marshal of said district, at Astoria, in said district, on the 4th day of December, A. D. 1882.

EDWARD S. KEARNEY,
U. S. Marshal,
By C. W. LOUGHERY, *Deputy.*

21 DISTRICT OF OREGON, *ss:*

I certify that on the 7th day of December, 1882, at Portland, Multnomah county, in said district, I duly served the within writ upon the therein-named Nancy Welch by exhibiting said writ to her and by delivering to her personally a true copy of said writ, duly certified to by me as U. S. marshal, together with a copy of the complaint in the within-entitled suit, duly certified to by the clerk of the circuit court for said district.

EDWARD S. KEARNEY,
United States Marshal,
By JAMES BROWN, *Deputy.*

21½ And afterwards, to wit, on the 22d day of December, 1882, there was duly filed in said court a notice of appearance, in words and figures as follows, to wit:

22 In the Circuit Court of the United States for the District of Oregon.

J. M. SHIVELY, Complainant,
vs.
NANCY WELCH, J. W. WELCH, J. N. DOLPH, & W. W. UPTON, Defendants.

The clerk of the above-entitled honorable court will please enter the appearance of the defendants, Nancy Welch, James W. Welch, and J. N. Dolph, in the above-entitled suit by—

J. N. DOLPH,
E. C. BRONAUGH,
C. A. DOLPH, AND
JOSEPH SIMON,
Their Solicitors.

(Endorsed:) Filed Dec. 22, 1882. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

23 And afterwards, to wit, on the 22d day of December, 1882, there was duly filed in said court a demurrer to the bill of complaint in words and figures as follows, to wit:

24 In the Circuit Court of the United States for the District of Oregon.

J. M. SHIVELY, Complainant,
vs.
NANCY WELCH, JAMES W. WELCH, J. N. DOLPH, and W. W. UPTON, Defendants.

The above-named defendants, Nancy Welch, James W. Welch, and J. N. Dolph, by protestation, not confessing all or any of the matters and things in the said complainant's bill contained to

be true in such manner and form as the same are therein set forth and alleged, do demur to the said bill, and for cause of demurrer show that:

First. The said bill is so uncertain in the allegations and charges therein contained as to fail to disclose any right on the part of the complainant to any portion of the discovery or relief prayed for.

Second. It appears upon the face of said bill that complainant has been guilty of such laches and delay in asserting the claimed rights alleged in said bill as to bar him from now attempting so to do in a court of equity.

Third. It appears upon the face of said bill that the right to the State's deed to said lands was determined, as between complainant and defendant, Nancy Welch, by the board of school land commissioners of the State of Oregon, which determination, in the absence of fraud, was and is final and conclusive and cannot be reviewed in this honorable court.

Fourth. It appears on the face of said bill that the conveyances therein mentioned from complainant and his wife Susan to James and Nancy Welch were in consideration of the with-
25 drawal by said James Welch of his claim to said lands as his donation land claim, and said Nancy Welch therefore in equity took the lands so conveyed to her free from any contracts of said James Welch concerning the appurtenances or riparian rights belonging to said land.

Fifth. Complainant has not by his said bill made such a case as entitles him in a court of equity to a discovery from these defendants respectively or any of them, or any relief against them, as to the matters contained in the said bill or any of such matters, and that any discovery which can be made by these defendants or any of them touching the matters complained of in the said bill, or any of them, cannot be of any avail to the said complainant for any of the purposes for which a discovery is sought against these defendants by the said bill nor entitle the said complainant to any relief in this court touching any of the matters therein complained of. Wherefore and for divers other good causes of demurrer appearing in the said bill these defendants do demur thereto, and they pray the judgment of this honorable court whether they shall be compelled to make any further and other answer to said bill, and they humbly pray to be dismissed from hence with their reasonable costs in this behalf sustained.

J. N. DOLPH,
E. C. BRONAUGH,
C. A. DOLPH, &
JOSEPH SIMON,
Solicitors for These Defendants.

26 UNITED STATES OF AMERICA, *ss:*

I, Earl C. Bronaugh, certify that I am one of the solicitors of the defendants whose demurrer the foregoing is; that I have carefully

examined the bill of complaint in this case, and that, in my opinion, said demurrer is well founded in point of law.

EARL C. BRONAUGH,
Solicitor for Defendants.

STATE OF OREGON, }
Multnomah County. }

I, J. N. Dolph, being duly sworn, say on oath that I am one of the defendants in the above-entitled suit and that the foregoing demurrer to the bill of complaint in said cause is not interposed for delay.

J. N. DOLPH.

Subscribed and sworn to before me this 21st day of December, A. D. 1882.

[NOTARIAL SEAL.] W. T. HUME,
Notary Public in and for Oregon.

Due service of a copy admitted this Dec. 22nd, 1882.
WM. STRONG AND SONS.

(Endorsed:) Filed December 22nd, 1882. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

26½ And afterwards, to wit, on the 15th day of January, 1883, there was duly filed in said court a notice of motion, in words and figures as follows, to wit:

27 In the Circuit Court of the United States for the District of Oregon.

J. M. SHIVELY, Complainant, }
vs.
NANCY WELCH *et al.*, Defendants. }

To J. H. Shively and Wm. Strong & Sons, his solicitors:

You are hereby notified that on Monday, the 15th day of January, A. D. 1883, at 10 o'clock a. m., the above-named defendants, Nancy Welch, James W. Welch, and J. N. Dolph, will move the above-entitled honorable court to set down for argument their demurrer to the bill of complaint in this suit.

J. N. DOLPH,
E. C. BRONAUGH,
C. A. DOLPH, AND
JOSEPH SIMON,
Sol. for said Def'ts.

Service by copy acknowledged this January 8th, 1883.
WM. STRONG & SONS,
Att'ys for Pl'ff.

(Endorsed:) Filed January 15th, 1883. R. H. Lamson, clerk.

27½ And afterwards, to wit, on Wednesday, the 28th day of February, 1883, the same being the 79th judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

28 In the Circuit Court of the United States for the District of Oregon.

J. M. SHIVELY
vs.
NANCY WELCH *et al.* } No. 860.

FEBRUARY 28, 1883.

This cause having heretofore been heard upon the demurrer to the bill herein and taken under advisement by the court, and now at this day the court being fully advised in the premises, and it appearing to the court that said bill is too uncertain and vague in its description of the lands in controversy, it is ordered that said demurrer be, and the same is hereby, sustained, and, upon motion of plaintiff, it is further ordered that plaintiff have thirty days to amend his said bill.

DEADY, *J.*

(Endorsed:) Filed February 28th, 1883. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

29 And afterwards, to wit, on the 16th day of May, 1883, there was duly filed in said court a stipulation in words and figures as follows, to wit:

30 In the Circuit Court of the United States for the District of Oregon.

J. M. SHIVELY
vs.
J. N. DOLPH *et al.*, Def'ts. }

The time for filing an amended bill in this cause is hereby extended for thirty days from this date.
M'ch 27, 1883.

DOLPH, BRONAUGH, DOLPH & SIMON,
Def'ts' Att'ys.

Time extended fifteen days.
Ap'l 26, 1883.

DOLPH & SIMON,
Def'ts' Att'ys.

Time extended five days.
May 11th, 1883.

DOLPH & SIMON,
Def'ts' Att'ys.

(Endorsed:) Filed May 16th, 1883. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

31 And afterwards, to wit, on the 16th day of May, 1883, there was duly filed in said court an amended bill of complaint, in words and figures as follows, to wit:

32 In the Circuit Court of the United States for the District of Oregon, in the Ninth Circuit.

To the judges of the circuit court of the United States for the district of Oregon, in the ninth circuit:

J. M. Shively, of San Francisco and a citizen of the State of California, brings this his amended bill against Nancy Welch and James W. Welch, both residents of the city of Astoria and citizens of the State of Oregon; J. N. Dolph, a resident of the city of Portland and citizen of the State of Oregon, and W. W. Upton, a resident of the city of Washington and a citizen of the District of Columbia, and thereupon your orator complains and says—

That in the month of March, 1844, he was occupying and claiming to hold as a settler's right the following-described tract of land or land claim situate in the county of Clatsop and State of Oregon, namely, a certain land claim thereafter and more particularly bounded and described as follows, to wit, being parts of sections 8, 9, 16, and 17, in township 8 north, of range 9 west, being bounded and described as follows, to wit: Beginning at a point in the south bank of the Columbia river 13 chains and 13 links west and 40 chains and 24 links north from the quarter post between said sections 9 and 16, in township 8 north, of range 9 west, thence south 97 chains; thence west 81 chains and 4 links; thence north 74 chains and 20 links to the Columbia river; thence with the meanders of said river north 28° 30′ east 3 chains 50 links; thence north 54° 30′ east 5 chains 50 links; thence north 87° east 4 chains 70 links; thence south 70° 30′ east 13 chains; thence south 34° 45′ east 7 chains 40 links; thence east 6 chains 20 links; thence
33 north 63° 30′ east 7 chains; thence east 6 chains; thence north 66° east 6 chains to meander post; thence north 43° 30′ east 3 chains 70 links; thence north 61° 15′ east 14 chains; thence north 50° 15′ east 19 chains 31 links to the place of beginning, containing 640.5 acres.

And in said month he laid off a large portion of said lands bordering on the Columbia river and extending back therefrom into town lots and blocks, numbered consecutively from 1 to 121, and mapped and platted the same, calling it "Plan of Astoria, laid off in March, 1844," commonly known as Shively's Astoria.

Second. That on the 18th day of April, 1845, your orator, by a certain instrument in writing under his hand and seal, bargained and sold to one James Welch all his right and title to one undivided half of said land and claim, excepting about twenty lots particularly specified in said deed.

Third. That prior to the 13th day of March, 1850, with the consent of the said James Welch, your orator added to said plat certain other blocks, numbered consecutively from 122 to 150, both inclusive, which said last-named blocks were located almost exclusively upon the shore of the Columbia river between ordinary high and low water mark.

Fourth. That on the 13th day of March, 1850, your orator and the said James Welch, at the time believing themselves to be each the owner of an undivided half of said lands, proceeded to divide the lots and blocks between themselves, so that each should be the separate owner of his part of said tract so far as the same had been mapped and platted into blocks and lots, and for this purpose they mutually
34 executed and delivered to each other instruments in writing under their respective hands and seals in the nature of quitclaim deeds, which, though informally drawn and executed, were then considered to be and were sufficient in law and equity to sever their respective interests in the blocks and lots then laid out so far as the same had not prior to that time been sold or conveyed; and thereafter the said James Welch had no legal or equitable right or title in or to said so-called donation land claim except as derived under said instruments in writing of the date of the 13th day of March, 1850, as hereinabove set forth and except as hereinafter expressly admitted and set forth.

Fifth. That after the passage of the act of Congress of the United States entitled "An act to create the office of surveyor general of the public lands in Oregon and to provide for the survey of and to make donation to the settlers of said public lands," approved September 27th, 1850, commonly known as the Oregon donation law, your orator, who then was and for more than four consecutive years prior thereto had been personally living upon and cultivating said lands, and who was a white male citizen of the United States, over the age of 21 years, a married man, and in all respects qualified and entitled to claim and hold the said land as a donation claim under said act of the 27th September, 1850, became and was, with the knowledge of the said James Welch, solely recognized in the Land Office of the United States as the proper claimant of the entire tract of land.

That your orator, from and after the said 27th day of September, 1850, and from and after the said act of Congress of that date hereinbefore referred to and specified, was the only person entitled to claim said donation land claim under said act and the laws
35 of the United States; but the said James Welch continued wrongfully to claim rights in said donation land claim and contested the application of your orator for a patent to said land and divers disputes and controversies arose between your orator and the said James Welch in relation to the validity of said agreements of the 18th day of April, 1845, and of the 13th day of March, 1850, between them, hereinabove set forth, and for the purpose of settling such disputes and controversies, by putting the validity of said agreement of division of the 13th day of March, 1850, beyond question, your orator and the said James Welch, on or about the

said 18th day of February, 1860, at which time your orator had completed his residence and cultivation and had become entitled to a patent from the United States for the entire donation land claim under said act of Congress approved September 27th, 1850, entered into an agreement by which the said land was to be divided between them—that laid off in lots and blocks to be described by numbers and that portion which had not been mapped or platted into lots or blocks to be described by apt and proper boundaries; and it was further agreed that your orator, in whom the legal title was supposed to be, should, with his wife, convey to the said James Welch or to such other person as he should direct the lots, blocks, and land coming to him, whereupon, on the 18th day of February, 1860, and in order to convey to him the legal title then vested in the plaintiff, your orator, or his wife, Susan L. Shively, and to cure defects, if any, in the quitclaim deeds of the 13th day of March, 1850, and to confirm the same and without any further consideration, your orator and Susan L. Shively, his wife, executed and delivered to the said James Welch their joint deed of
36 general warranty against all persons, the United States excepted, for the following-described real property, part and parcel of the said donation land claim hereinabove first described: The west half of that certain two-hundred-acre tract of land in the southeast corner of our land claim in township 8 north, range 9 west, in the county of Clatsop and State of Oregon, which two-hundred-acre tract is bounded and described as follows: On the north by the town plat of Astoria, as laid out and recorded by John M. Shively; on the east by the east line of said land claim, on the south by the south line of said land claim, and on the west by a line parallel with the east line, so as to include two hundred acres; also the following lots and blocks in the said town plat of Astoria: Blocks 3, 7, 11, 22, 23, 27, 31, 35, 39, 45, 47, 51, 54, 58, 62, 66, 70, 74, 78, 82, 86, 89, 93, 97, 101, 107, 112, 114, 117, 118, 120, 122, 123, 124, 126, 127, 129, 130, 131, 133, 135, 136, 138, 140, 142, 144, 146, 148, 150 and lots 5 and 6, block 119; lots 5 and 6, block 134, and lots 1, 7, and 12, block 115.

And at the same time, as a part of the same transaction and for a like purpose, and for the same consideration and for none other, at the direction and upon the request of the said James Welch, your orator, with his said wife, executed and delivered to the said defendant, Nancy Welch, who was the wife of the said James Welch, a like deed of general warranty for the following-described real property, the same being part and parcel of the said donation land claim of your orator hereinabove first described:

The east half of a certain two-hundred-acre tract of land in the southeast corner of our land claim, in township 8 north, of range 9 west, in Clatsop county, Oregon, which two-hundred-acre tract is bounded on the north by the town plat of Astoria, as laid out and recorded by said John M. Shively; on the east and south by
37 the boundary line of our said land claim, and on the west by a line parallel to the east line, so as to include two hundred acres; also the following blocks and lots in said town plat,

namely: Blocks 5, 6, 9, 13, 15, 17, 21, 25, 29, 33, 37, 41, 45, 49, 53, 56, 60, 64, 68, 72, 76, 80, 84, 88, 91, 95, 99, 105, 109.

That the two deeds from your orator of the 18th day of February, 1860, hereinbefore referred to, were intended to be and *was* a full settlement of all the respective parties' claims to the land claim herein first described and were so received and accepted by the said James Welch, who, in consequence, withdrew the opposition which he had previously made to the claim of plaintiff to the patent for said land.

Sixth. That the said Nancy Welch paid no consideration whatever for the real property conveyed to her by said deed of February 18th, 1860, but the same was a gift from her said husband, nor did your orator or his said wife receive from said Nancy Welch at any time any consideration whatever for the lands conveyed to her by your orator and his said wife, Susan L. Shively, or was any consideration paid for said land by said Nancy Welch.

Seventh. That it was at the time of the division so made as aforesaid on the 18th day of February, 1860, intended by the parties to make a full, final, and equal division of all of said land claim, together with the appurtenances, including riparian rights upon the Columbia river, so that no future controversy could thereafter arise between them concerning any matter or thing growing out of their copartnership in said lands.

Eighth. That afterwards, on the 24th day of January, 1866, a patent from the United States for said lands herein first above
38 described issued to your orator, granting and conveying to him the east half thereof and to the said Susan L. Shively, his wife, the west half thereof; that said block No. 111 of Shively's Astoria, — county, Oregon, is situated upon or in front of the west half of said land claim or that portion thereof set over to Susan L. Shively by the United States patent above set forth of date January 24th, 1866, and that the said blocks Nos. 41, 46, & 145 and the west half thereof are situated upon or in front of the east half of said land claim.

That on the 7th day of March, 1871, your orator and Susan L. Shively, his wife, for a valuable consideration, by a deed duly made, executed, and delivered, conveyed to one Milton Elliot all the lands, lots, blocks, fractional lots and blocks contained or embraced in the west half of the lands patented by the United States to John M. Shively and Susan L. Shively, his wife, on the 24th day of January, 1866, and being the same lands herein first above described, save and excepting from the operation of said deeds lots Nos. 5, 6, 7, 8, and 9, in block No. 114, block No. 116, and also 55 acres of land bounded on the north by the south line of the said town of Astoria, on the west by the western boundary line as described in said patent, on the south by the south boundary line described in said patent, and on the east by a line running due north and south to points in said southern boundary lines of said patent and the town of Astoria at a distance sufficiently far east in each of said last-named lines as to embrace 55 acres of land.

That on the 8th day of March, 1871, the said Milton Elliot, for a

valuable consideration, by a deed duly made, executed, and delivered, conveyed to this plaintiff all the lands last above described
39 and conveyed by the deed of plaintiff and wife to Milton Elliot, above set forth, whereby your orator became vested with all the right, title, and interest of the said Susan L. Shively in and to the lands set over to her by said patent of the United States to John M. Shively and wife and of date January 24, 1866, excepting the lands reserved in said deed to Milton Elliot of date March 7th, 1871.

Ninth. That in the division of the lots and blocks aforesaid between the plaintiff, your orator, and the said James Welch the said blocks were recognized and treated each as a distinct and separate tract of land, with a street for a definite exterior boundary line on all sides of the block, as indicated upon the maps and plats hereinbefore referred to, and the several blocks partitioned to the said James Welch included in the said quitclaim deed to the said James Welch of the 13th March, 1850, hereinbefore described, were so known and described, as also in the warranty deeds of February 18th, 1860, from your orator and his said wife, one to the said James Welch and the other to the said Nancy Welch, and were at the time of making of the said several deeds of such partition noted, designated, and indicated upon the original map and plan of Astoria and the first addition thereto, and the blocks partitioned off to plaintiff were specially marked and indicated upon said map and plat by a blue shading, while those partitioned to the said James Welch were left plain.

Tenth. That block number 13, which in the deed of March 13, 1850, was assigned to the said James Welch and in the agreement of February, 1860, was assigned to the said James Welch, but was at his request conveyed to his wife, the said Nancy Welch, as is hereinbefore set forth, was represented on said map by which
40 the division was made as an entire block, 300 feet square, bounded on the north by Wall street, on the east by West 4th street, on the south by Arch street, and on the west by West 5th street; but the same was situate partly above and partly below the line of ordinary high tide upon the bank of the Columbia river, as is more fully shown and represented in the plat hereto attached, marked Exhibit "A," and made a part hereof.

Eleventh. That block No. 111, which, by the deed of James Welch to your orator, was conveyed to your orator, was situate immediately in front or north of said block No. 13, and lies wholly below ordinary high tide and above ordinary low tide of said Columbia river, and was represented as a block of 300 feet square, bounded on the north by Cedar street, on the east by West 4th street, on the south by Wall street, and on the west by West 5th street, as will more fully appear by Exhibit "A" hereinbefore referred to.

Twelfth. That at the date that the title to said donation land claim became vested in your orator and in his wife, Susan L. Shively, and at the date of the United States Government official survey of said donation land claim, a large part or portion of said block number 13 was entirely above the line of ordinary high tide in said Columbia river, and a portion of said block number 111 and of Wall street,

running east and west between said blocks 13 and 111, in said city of Astoria, was above the line of ordinary high tide in said Columbia river, all of which will more fully appear from the map or plat, hereto attached, marked Exhibit "B," and made a part hereof.

Thirteenth. That block number 5, which, in the deed of March 13th, 1850, was assigned to the said James Welch, and in the agreement of February, 1860, was assigned to the said James Welch, and
41 was at his request conveyed to his wife, the said Nancy Welch, as is hereinbefore set forth and represented on said map, by which the division was made, as — entire block of 300 feet square, bounded on the north by Hemlock street, on the east by East 4th street, on the south by Pine street, and on the west by East 5th street, and the same was, at the date that the title to said donation land claim became vested in your orator and his said wife and at the date of the United States Government official survey of said donation land claim, situate above the line of ordinary high tide upon the bank of the Columbia river and within the legal boundaries or meander line of said donation land claim, but that at the date hereof the line of ordinary high tide of said Columbia river is upon the south half of said block No. 5; all of which will more fully appear from the map or plat, hereto attached, marked Exhibits "C" and "D" and made a part hereof.

Fourteenth. That block No. 145, which, by the deed of James Welch to your orator, was conveyed to your orator, was situate immediately in front of or north of said block No. 5 and lies below the line of ordinary high tide of said Columbia river, and was represented as a block 300 feet square, bounded on the north by William street, on the east by East 4th street, on the south by Hemlock street, and on the west by East 3rd street.

Fifteenth. That a strip of land nearly the entire width of Hemlock street of said city and included within the legal boundary lines of the donation land claim patented by the United States to your orator and his said wife separates and divides said blocks Nos. 5 and 145; all of which will more fully appear from the map or plat, hereto attached, marked Exhibit D, and made a part hereof.

42 Sixteenth. That since the date that the legal title to said donation land claim became vested in your orator and his said wife and since the date of the United States Government official survey of said donation land claim the shore of said Columbia river at and in the vicinity of blocks 5, 13, 111, and 145 have been washed away for some distance south, and thereby the line of ordinary high tide in said Columbia river has moved south and over and upon the lands patented by the United States to your said orator and his wife.

Seventeenth. That on the 3d day of September, 1875, the said Nancy Welch, claiming to be entitled thereto under the act of the legislative assembly of the State of Oregon entitled "An act to provide for the sale of tide and overflowed lands on the sea shore and coast," approved October 28th, 1872, made application to the board of commissioners of the State of Oregon for the sale of school lands to purchase the tide lands lying in front of block No. 13, which

included block No. 111, and also the tide lands in front of block No. 5, which included blocks Nos. 145, 41, and 46, falsely representing and pretending that she was entitled to the same as appurtenant to the said blocks Nos. 5 and 13 and representing in her application and accompanying affidavit that the same were not held by any person claiming by, through, or under her or under any one through whom she claimed title, well knowing that each and every of said pretences were false and untrue, and that your orator was the equitable owner of the same and entitled to purchase the same from the State, and on or about the 28th day of August, 1876, she obtained from said board of commissioners of the school lands of the State of Oregon a deed for all the tide
43 lands in front of said block No. 13, including said block No. 111; also all tide lands in front of the west half of block No. 5, including all the lands in the west half of blocks Nos. 145, 41, and 46.

Eighteenth. Your orator further alleges that at the date of said application and up to and including the date of the execution of said deed by said commissioners of the State of Oregon he was an applicant in due form of law to purchase said block No. 111 and west half of blocks Nos. 145, 41, and 46, and was the only person entitled to purchase the same under said act.

Nineteenth. That during all the period aforesaid from the said 13th day of March, 1850, down to and including the time when the State deed was executed to the said Nancy Welch that your orator was in equity the owner of said block No. 111 and the west half of blocks Nos. 145, 41, and 46, and entitled to claim and purchase the same from the State of Oregon, all of which the said Nancy Welch then and during all of said period of time well knew and of all of which she then and at all times had knowledge and due notice.

Twentieth. That the title of the said Nancy Welch to said block No. 111 and to all tide land north of the centre of said Wall street, the north boundary line of said block 13, and to all tide land lying north of the west half of block No. 5, north of the centre line of Hemlock street, the north boundary line of said block, is fraudulent and void as against your orator.

Twenty-first. That the said James W. Welch, J. N. Dolph, and W. W. Upton, on the 19th day of October, 1876, procured a deed from the said Nancy Welch each for an undivided quarter of said block No. 111 and the undivided quarter of the west half of said blocks Nos. 145, 41, and 46, and claim to hold their interest through her
44 and not otherwise; that at the time they procured said title they paid no consideration therefor and well knew all and singular the premises, and that the said Nancy Welch had no right, title, or interest in said block No. 111 or in the west half of said blocks Nos. 145, 41, and 46, or in any of their appurtenances or to any of the tide land upon or in front of the same, and that the said conveyance from the State of Oregon was as to her with notice fraudulent and void, and that she held the legal title only for the use and benefit of your orator.

Twenty-second. That the value of the property in controversy in

this suit exceeds the sum of five hundred dollars and that the same is about the value of five thousand dollars.

Wherefore your orator prays that the said Nancy Welch, James W. Welch, J. N. Dolph, and W. W. Upton may be restrained and enjoined from proceeding at law to obtain possession of said real property or in any manner interfering with your orator's possession thereof; that your orator may be adjudged and decreed to be the equitable owner of the same; that the said Nancy Welch may be decreed to have received said deed from the State of Oregon in trust for your orator, and that said Nancy Welch, James W. Welch, J. N. Dolph, and W. W. Upton be decreed to execute and deliver to your orator good and sufficient deeds conveying to your orator the title to said block No. 111 and the west half of said blocks Nos. 145, 41, and 46, and for such other and further relief as may be equitable and for his costs and disbursements.

And may it please your honors to grant unto your orator a writ of subpœna of the United States of America, issuing out of and
45 under the seal of this honorable court, directed to the said Nancy Welch, James William Welch, J. N. Dolph, and W. W. Upton, defendants, commanding them, on a day certain therein to be named and under a certain penalty, to be and appear in this honorable court, then and there to answer all and singular the premises and to stand to, perform, and abide such further order, direction, and decree as may be made against them.

And your orator, in duty bound, will ever pray, &c.

WM. STRONG,
F. R. STRONG, AND
THOS. N. STRONG,
Solicitors for Complainant.

UNITED STATES OF AMERICA, }
District of Oregon, Multnomah County, State of Oregon, } ss:

I, F. R. Strong, being duly sworn, depose and say that I am one of the solicitors for complainant in the foregoing bill; that I have read the same and know the contents thereof; that I have knowledge of the matters in said bill stated and the same are true except as to those matters which are therein stated to be on information and belief, and as to those matters I verily believe it to be true; and the reason why I make verification to said bill is because my client, the complainant herein, is not at this time within this county.

F. R. STRONG.

Subscribed and sworn to before me this 16 day of May, 1883.

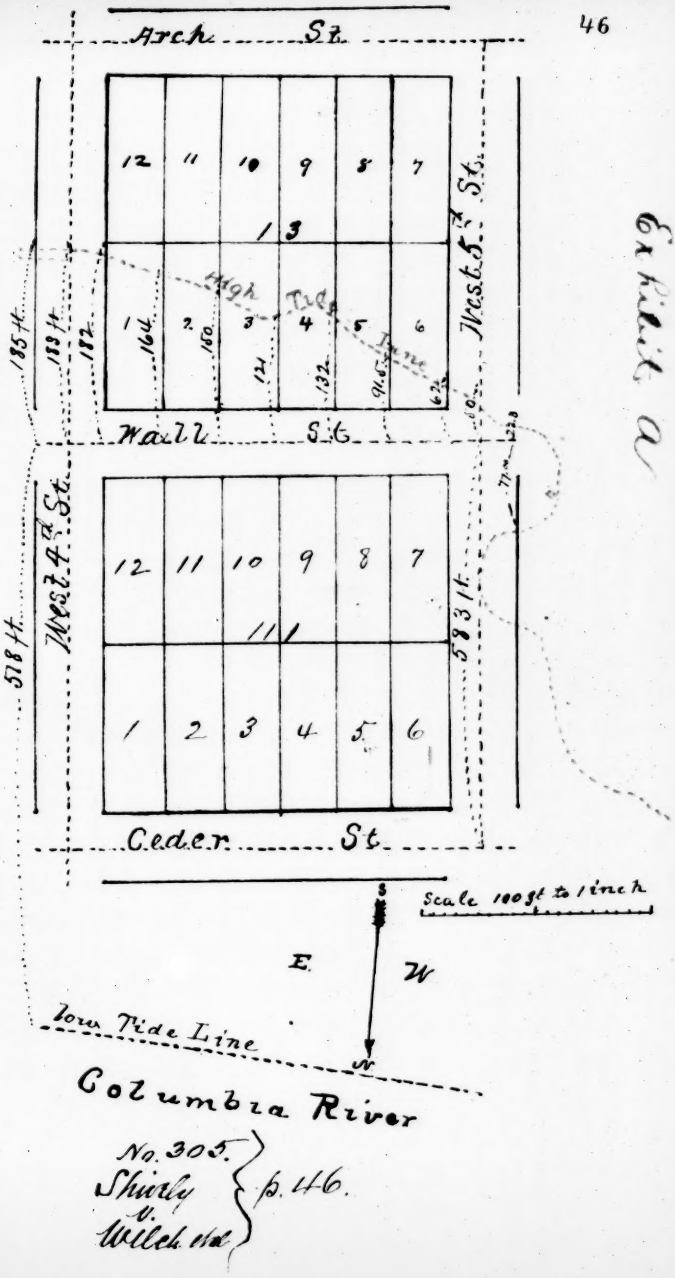
R. H. LAMSON, *Clerk*,
By G. G. GAMMANS, *Deputy*.

(Next follows "Exhibit A," "Exhibit B," "Exhibit C," and "Exhibit D.")

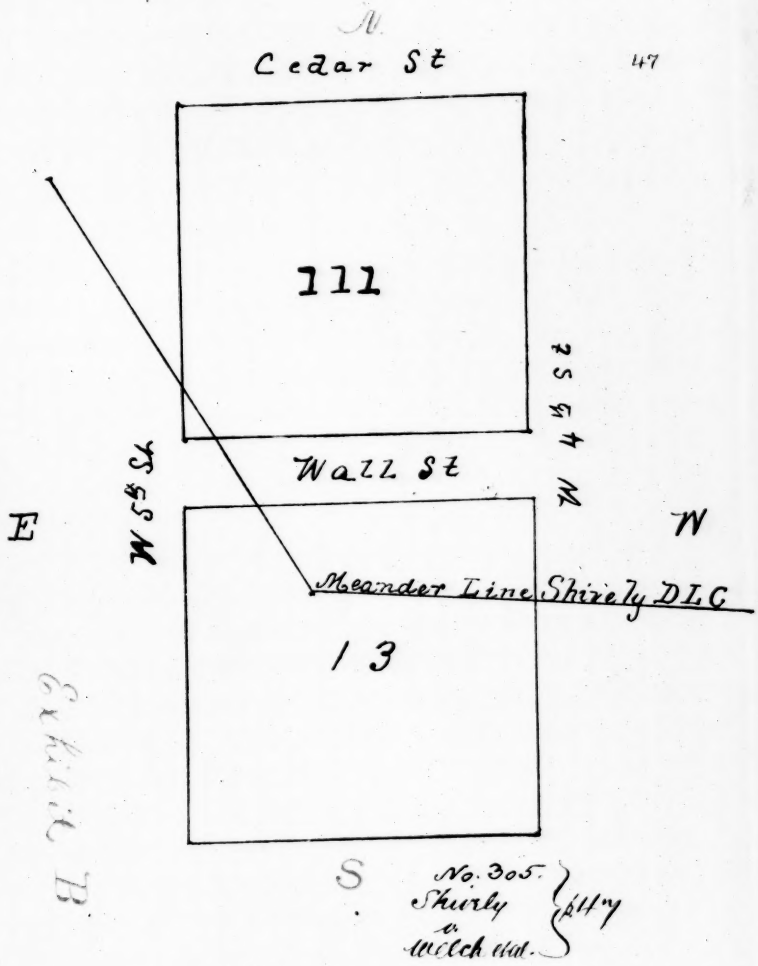
(Here follow diagrams marked pp. 46, 47, 48, & 49.)

50 (Endorsed:) Filed May 16, 1883. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

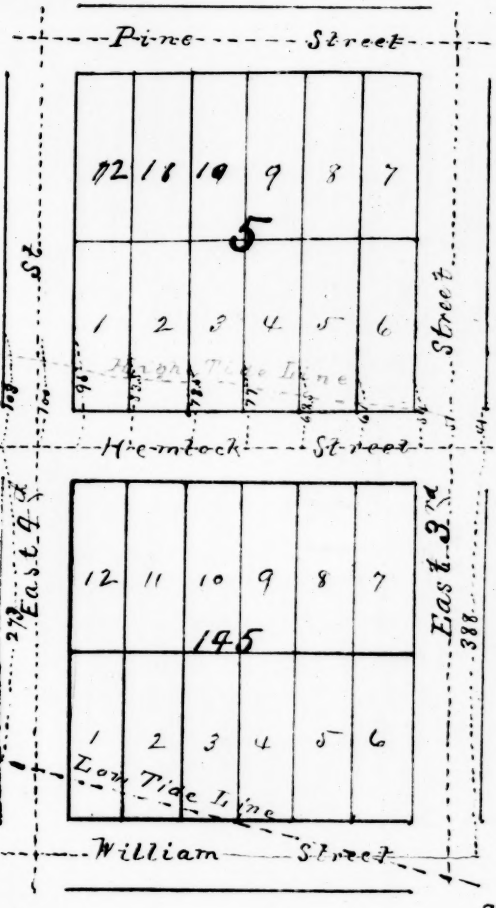
Exhibit A



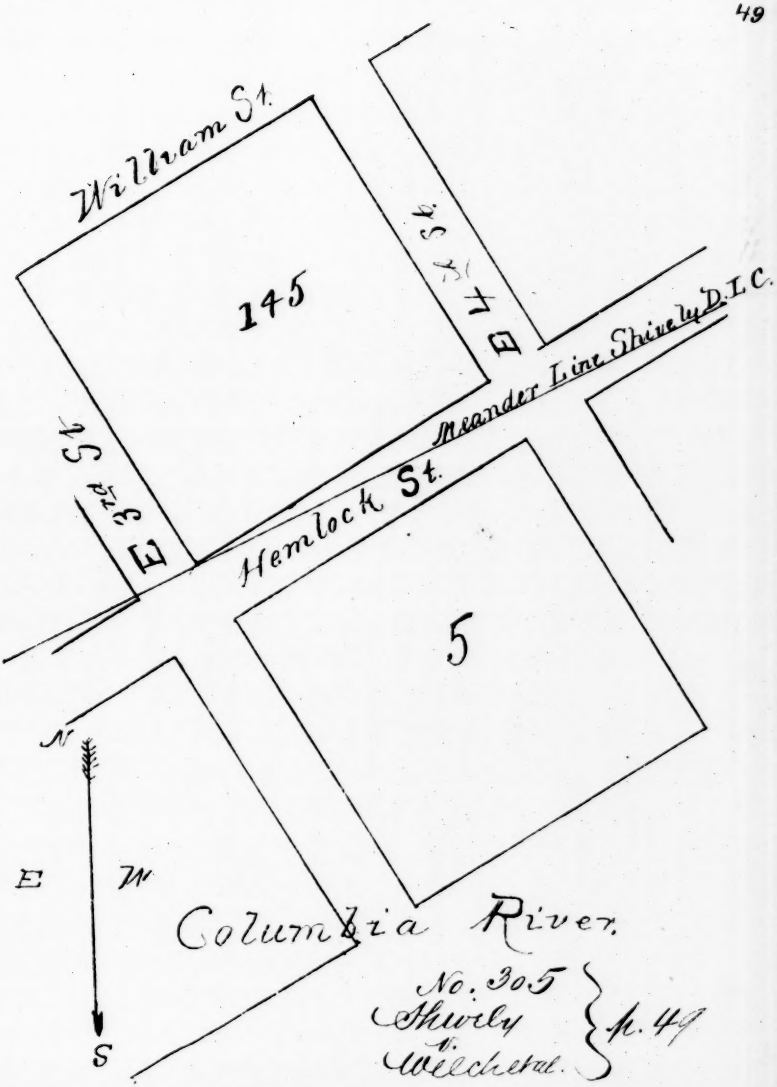
No. 305.
Shirley
v.
Welch et al
} p. 46.



No. 305.
Shirly
to
Welch et al.
Plat



No. 305
Thirty
Welch Add
} p. 48



No. 305
Shively
v.
Wilcheteal.
} p. 49

Exhibit D

51 And afterwards, to wit, on the 4th day of June, 1883, there was duly filed in said court a demurrer to the amended bill in words and figures as follows, to wit:

52 In the Circuit Court of the United States for the District of Oregon.

J. M. SHIVELY, Complainant,
vs.
NANCY WELCH, JAMES W. WELCH, J. N. DOLPH, and W. W. UPTON, Defendants.

The above-named defendants, Nancy Welch, James W. Welch, and J. N. Dolph, by protestation, not confessing all or any of the matters and things in said complainant's amended bill contained to be true in such manner and form as the same are therein set forth and alleged, do demur to the said amended bill, and for causes of demurrer show:

First. That said amended bill is so uncertain in the allegations and charges therein contained as to fail to disclose any right on the part of the complainant to any portion of the discovery or relief prayed for.

Second. It appears upon the face of said amended bill that complainant has been guilty of such laches and delay in asserting the claimed rights alleged in said amended bill as to bar him from now attempting so to do in a court of equity.

Third. It appears upon the face of said amended bill that the right to the State's deed to said lands was determined, as between complainant and defendant, Nancy Welch, by the board of school land commissioners of the State of Oregon, which determination, in the absence of fraud, was and is final and conclusive and cannot be reviewed in this honorable court.

Fourth. It appears on the face of said amended bill that the conveyances therein mentioned from complainant and his wife Susan to James and Nancy Welch were in consideration of the with-

53 drawal by said James Welch of his claim to said lands as his donation land claim, and said Nancy Welch therefore in equity took the lands so conveyed to her free from any contracts of said James Welch concerning the appurtenances or riparian rights belonging to said land.

Fifth. Complainant has not by his said amended bill made such a case as entitles him in a court of equity to any discovery from these defendants respectively or any of them, or any relief against them, as to the matters contained in the said amended bill or any of such matters, and that any discovery which can be made by these defendants or any of them touching the matters complained of in said amended bill, or any of them, cannot be of any avail to the said complainant for any of the purposes for which a discovery is sought against these defendants by the said amended bill nor entitle the said complainant to any relief in this court touching any of the matters therein complained of.

Wherefore and for divers other good causes of demurrer appearing in the said amended bill these defendants do demur thereto, and they pray the judgment of this honorable court whether they shall be compelled to make any further and other answer to said amended bill, and they humbly pray to be dismissed from hence with their reasonable costs in this behalf sustained.

J. N. DOLPH,
C. A. DOLPH, AND
JOSEPH SIMON,
Solicitors for Defendants.

54 UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I, Joseph Simon, certify that I am one of the solicitors of the defendants whose demurrer the foregoing is; that I have carefully examined the amended bill of complaint in this suit and that, in my opinion, said demurrer is well founded in point of law.

JOSEPH SIMON,
Solicitor for Defendants.

STATE OF OREGON, } ss:
Multnomah County, }

I, J. N. Dolph, being duly sworn, say on oath that I am one of the defendants in the above-entitled suit, and that the foregoing demurrer to the amended bill of complaint in said cause is not interposed for delay.

J. N. DOLPH.

Subscribed and sworn to before me this 4th day of June, 1883.
[NOTARIAL SEAL.] J. B. SCOTT,
Notary Public in and for Oregon.

(Endorsed): Filed June 4th, 1883. R. H. Lamson, clerk, by G. G. Gammans, deputy.

55 And afterwards, to wit, on Monday, the 21st day of April, 1884, the same being the 5th judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

56 In the Circuit Court of the United States for the District of Oregon.

J. M. SHIVELY
vs.
NANCY WELCH, JAMES W. WELCH, J. N. DOLPH, and W. W. UPTON. } No. 860. April 21, 1884.

This cause having heretofore been heard upon the demurrer to the amended bill herein, and argued by Mr. F. R. Strong, of counsel for plaintiff, and by Mr. J. N. Dolph, of counsel for defendants, and

taken under advisement by the court, and now, at this day, the court being fully advised in the premises—

It is adjudged that the facts stated in the said amended bill are not sufficient to entitle the plaintiff to the relief prayed for therein and that there is no equity in said bill, and therefore it is now adjudged and decreed that the same be, and hereby is, dismissed, and that the defendants have and recover from said plaintiffs their costs and disbursements herein to be taxed.

DEADY, *J.*

(Endorsed:) Filed April 21, 1884. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

57 And afterwards, to wit, on the 21st day of April, 1884, there was duly filed in said court an opinion of the court, in words and figures as follows, to wit:

58 Circuit Court, District of Oregon.

MONDAY, *April* 21, 1884.

JOHN M. SHIVELY
v.
NANCY WELCH, JAMES W. WELCH, JOSEPH N. DOLPH, & W. W. UPTON. } No. 860.

Suit to Declare the Defendants Trustees and for a Conveyance.

(1.) Decision of the tide-land commissioners.—The commissioners, under the acts of 1872 and 1874 to dispose of the State tide lands, were authorized to decide who was entitled in certain cases to be preferred as a purchaser thereof, and their determination of the matter cannot be questioned elsewhere, except for an error of law or a fraud extrinsic and collateral to the contest, by which a full and fair hearing of the matter was prevented.

(2.) Settler under the donation act.—It does not appear that James Welch was ever a "settler" under the laws of the provisional government or the donation act upon the donation patented to John M. Shively and wife; and if he was, upon his abandonment of all such claim thereto in 1860 and before he was entitled to the grant, his wife had no interest in it or the consideration received therefor.

(3.) Conveyance to one person upon a consideration moving from another.—In 1860 John M. Shively, in consideration that James Welch abandon his claim to be a "settler" upon the former's donation claim, conveyed a certain portion thereof to said Welch and a like portion, including blocks 5 and 13 in "Shively's Astoria," to his wife, Nancy: Held that Nancy did not hold said blocks under her husband, but the grantor, Shively, and therefore she was entitled, under the acts of 1872 and 1874 (Ses. L., 129, 76), to purchase the tide land in front of said blocks, although her husband had quitclaimed the same to Shively in 1850.

DEADY, *J.*:

This suit is brought by the plaintiff, John M. Shively, to have the defendants, Nancy Welch, James W. Welch, Joseph N. Dolph, and W. W. Upton, declared to be the trustees of the plaintiff for certain tide lands conveyed to said Nancy by the commissioners for the sale of school lands, under and by virtue of the act of October 28, 1872 (Ses. L., 129), on August 28, 1876, the same being known as block 111, in front of shore block 13, in the town of Astoria, Or., and the west half of each of the blocks 41, 46, and 145, lying in front of the west half of block 5, in said town, and of the alleged value of more than $5,000.

The cause was heard on a demurrer to the amended bill, from which latter it appears—

That in March, 1844, the plaintiff, John M. Shively, was a "settler" under the laws of the provisional government on a tract of public land on the south bank and near the mouth of the Columbia river, containing 640.56 acres, and laid off a town thereon, containing 121 blocks, divided into lots, and extending from ordinary high water to the southward, and commonly known as "Shively's Astoria;" and on April 18, 1845, he bargained and sold by an instrument in writing to James Welch the undivided one-half of said lands and blocks, except about 20 lots; that prior to March 13, 1850, the plaintiff, with the consent of Welch, laid off additional blocks, numbered from 122 to 150, both inclusive, the same being situate almost wholly in front of said tract of land and between ordinary high and low water mark, and on said day said Shively and Welch divided the premises, so far as surveyed into blocks, between them, and by their deeds quitclaimed the same to each other; that upon the passage of the donation act (September 27, 1850, 9 Stat., 497) the plaintiff became and was a qualified married "settler" on said land under said act, and had been such settler for more than four years prior thereto, to the knowledge of said Welch, who, nevertheless, now disputed the plaintiff's right to hold said land as a donation under said act, by reason of the premises; and for the purpose of settling said dispute, on February 18, 1860, the plaintiff and his wife, Susan L., in pursuance of an arrangement with said Welch to that effect, conveyed by deed, with a general warrantry, to the latter and his wife, Nancy, each one-fourth of the unplatted portion of said donation and certain of the blocks aforesaid, in number about one-fourth of the whole number surveyed; that the conveyance to said Nancy included the blocks 5 and 13 aforesaid, and was made to her at the request of her husband and upon the consideration and for the purposes aforesaid and not otherwise, and thereupon said Welch ceased and withdrew his opposition to the plaintiff's claim to the premises as a donne under the donation act, and thereafter, on January 24, 1866, a patent was duly issued thereunder, conveying the east half of the donation to the plaintiff and the west half to his wife, Susan L.; that blocks 111 and 145 are wholly below ordinary high tide, and were represented on the map of "Shively's Astoria" as being each 300 feet square, bounded on all sides by streets, and were included in the

quitclaim of March 13, 1850, made by Welch to the plaintiff; and said block 111 is immediately in front and north of the shore block 13 in the west half of said donation, from which it is separated on said map by Wall street, while block 145 is immediately in front and north of shore block 5 in the east half of said donation, from which it is separated on the map by Hemlock street; that both Wall and Hemlock streets are now below ordinary high-water mark, and block 13 is more than one-fourth and block 5 near one-sixth below said line, but in 1856, at the date of the official survey of the Shively donation, a small portion of the west end of Wall street was above the meander line, while such line ran diagonally through the whole length of Hemlock street in front of block 5, so as to leave about three-fourths of the same above said line and about one-fifth of block 13 was below said line.

On March 7, 1881, the plaintiff and wife conveyed the latter's half of the donation, with certain exceptions not material to this case, to Milton Elliott, and on the day following he conveyed the same to the plaintiff.

On September 3, 1875, Nancy Welch applied to the commissioners of the State for the sale of school lands to purchase the tide lands lying in front of blocks 5 and 13, under the State act of October 28, 1872, "to provide for the sale of tide and overflowed lands on the sea and shore coast" (Ses. L., 129), and the act of October 29, 1874 (Ses. L., 76), amendatory thereof, as the owner of said blocks, and represented that said tide land was not held by any person claiming by, through, or under her, or any one through whom she claimed, which representation the bill alleges to have been false to the knowledge of the party making it, who then knew, as it is alleged, that the plaintiff was the "equitable owner" of the property and entitled to purchase the same from the State, and that about August 28, 1876, she obtained from said commissioners a conveyance of the tide land in front of block 13 and the west half of block 5, including block 111 and the west half of block 145, while the plaintiff, at the date of both said application and conveyance, was an applicant in due form of law for the purchase of said tide lands, and was the only person entitled to purchase the same under said act.

On October 19, 1876, the defendants, James Welch, Joseph N. Dolph, and W. W. Upton, procured a conveyance from said Nancy Welch of an undivided one-fourth of said tide lands, and it is alleged that the "title" of said Nancy is "fraudulent and void" as against the plaintiff, and that the conveyance to her codefendants was made without consideration and received by them with full knowledge of the premises.

The defendants for cause of demurrer to the amended bill, among others, allege: 1, that the question of who was entitled to the conveyance from the State was determined by the commissioners, and their decision, in the absence of fraud, cannot be reviewed by the court; 2, that Nancy took the land and blocks conveyed to her by the plaintiff "free from any contracts of her husband concerning the appurtenances or riparian rights belonging to said land;" and (3) that there is no equity in the bill.

The location of blocks 41 and 46 is not definitely shown by the bill, but it may be gathered therefrom that they are in front of block 5 and beyond block 145, in which case they are in deep water and below the line of ordinary low tide and therefore not tide lands. Besides, it appears from the bill that block 41 is in the deed of February 16, 1860, executed by the plaintiff and wife to Nancy Welch, with warranty, which estops the plaintiff from now claiming any right or interest therein as against said Nancy.

This being so, counsel for the plaintiff consents that the bill may be considered dismissed as to these two blocks.

The act of 1872, under which Nancy Welch purchased the tide land in question, provides that the owner of any land fronting on or bounded by the shore of any "bay, harbor, or inlet on the seacoast" of Oregon shall have the right to purchase from the State all the tide land belonging thereunto in front of such owner (§ 1).

The commissioners for the sale of school lands—the Governor, treasurer, and secretary of state—are authorized to sell such lands to the owner of the land that abuts or fronts thereon on proof of such ownership (§§ 2 and 3); and if the application to purchase is not made by the owner within twelve months from the
59 passage of the act, then such tide land may be purchased by any citizen or resident of Oregon (§ 5).

By the amendment of 1874 § 1 was extended to tide lands on rivers and their bays in which the tide ebbs and flows, excluding the Wallamet, "the tide and overflowed lands" on which were thereby directly granted to the owners of the adjacent property; and § 5 was amended so as to allow the adjacent owner three years from the passage of the act within which to apply for the purchase of tide lands; and to provide that upon an application to purchase by any one other than the owner of the adjacent land or his grantee notice thereof shall be given to such owner or grantee and to any person in the possession of such tide lands or the improver of the same, who shall have 60 days after service of such notice to make application for the purchase of such lands, which application shall have preference over all others; and all applications to purchase tide lands shall be accompanied by an affidavit of the applicant "setting forth the fact that such land is not held by any other person under a deed from said applicant or any person under whom he holds."

The land in the Territory of Oregon, including the beds and shores of the navigable waters below ordinary high tide or water, belonged, prior to the admission of the State into the Union, to the United States as proprietor, and was subject to its jurisdiction as sovereign. Upon the admission of the State into the Union such bed and shores not otherwise disposed of by the United States became the property of the State in its sovereign capacity and subject to its jurisdiction and disposal. Pollard *v.* Hagan, 3 How., 228; Barney *v.* Keokuk, 94 U. S., 336; Shively *v.* Parker, 9 Or., 504.

The United States, so far as appears, never undertook to dispose of any — the shore or tide lands in Oregon during the territorial period, and therefore upon the admission of the State into the Union,

on Feb. 14, 1859 (11 Stat., 383), the same became subject to the control and disposition of the latter. In pursuance of this power the State has provided for the sale and disposition of these lands by the passage of the act of 1872 and the amendment of 1874. Under them Nancy Welch, as the owner of the adjacent highland, became the purchaser of the parcels of tide land known in this suit as blocks 111 and the west half of 145.

But it is alleged that the purchase was fraudulent on her part because she falsely represented herself to be entitled to purchase the same in preference to the plaintiff. It does not appear from the bill in what this fraud consists or wherein her representation as to her qualifications is false, otherwise than that her conclusion from the admitted facts as to her right in the premises may have been erroneous.

But the question of Nancy Welch's rights as a preferred purchaser arose before the commissioners charged with the disposition of the land upon due notice to the plaintiff, who, I suppose, had the right and did contest the matter before them; and their conclusion or action in the premises cannot be questioned, unless for error in the construction or application of the law or for some fraud, extrinsic and collateral to the contest, by which the plaintiff was prevented from having a fair and full hearing before the commissioners. At least, such is the rule laid down by the national courts in regard to similar proceedings before the officers of the Land Department. Aiken *v.* Ferry, 6 Saw., 79; Vance *v.* Burbank, 101 U. S., 519, and cases there cited.

In the course of the business before the commissioners the question arose and was contested as to which of the two applicants was entitled to purchase from the State the tide land in question. Their action in determining such a question is in all respects analogous to that of the officers of the Land Office in determining a contest before them and should receive the same consideration when questioned in the courts.

Now, there is no such fraud alleged or pretended as would vitiate the decision of the commissioners in this case. So far as appears, Nancy did nothing to prevent a full and fair hearing of the matter by the commissioners or to hinder or prevent the plaintiff from presenting his claim to them in the best possible light. Presumably, the facts concerning the alleged rights of the adverse applicants were presented to the commissioners as here stated, and there as here, there being no dispute about them, they, as a question of law, decided the contest in favor of Nancy; and, now, whether the matter of law was correctly decided by them is the only question in this case.

It is admitted that Nancy was the owner of the adjacent highland, but it is claimed that the tide land was "held" by the plaintiff under a deed not from Nancy, but from James Welch, under whom, it is claimed, she "held" the highland, and therefore her right to purchase was subordinate under the act to that of the plaintiff. The argument in support of this proposition is that Welch having in March, 1850, quitclaimed the tide blocks 111 and 145 to the plain-

tiff, and the latter having in February, 1860, at the instance and request of said Welch and upon a consideration moving from him, conveyed the blocks 5 and 13 to Nancy, therefore Nancy "held" the same under said Welch, the same person under whom the plaintiff "held" the tide land included in the quitclaim of 1850.

Leaving out of consideration the fact that neither Shively nor Welch ever had any right to purchase the same until and except for the act of 1872, and that their quitclaims of 1850 did not estop either of them from asserting and maintaining as against the other any after-acquired estate or interest in them or right to purchase the same from the State (Rawle on Cov., 409; Van Rensselaer *v.* Kearney, 11 How., 322; Fields *v.* Squiers, 1 Deady, 379; Lownsdale *v.* Portland, *id.*, 15), it is very clear that Nancy Welch never "held" the blocks 5 and 13 under her husband, James Welch, but I cannot rest this conclusion upon the argument made in its support by the counsel for the defendants.

That argument is this: James Welch, at the date of the conveyances to him and his wife in 1860, was a "settler" on the premises under the donation act and in the compromise then made between himself and Shively, in which he abandoned his claim to be such "settler," the one-half of the land and blocks conveyed by Shively in consideration of such abandonment was conveyed to Nancy, because, as Welch's wife, she was jointly interested with him in the land upon which he was a settler under the donation act, and therefore the consideration for the conveyance from Shively to her moved from her and not her husband, whereby she "holds" under the former and not the latter.

But there is no warrant upon the facts stated in the bill, particularly when considered in the light of contemporaneous history, for concluding that Welch was ever a "settler" upon this land under either the donation act or the laws of the provisional government. True, he lived upon it, but only as the purchaser of certain parcels of the same or an interest thereof under and from such a settler—John M. Shively. After the passage of the donation act in September, 1860, he probably ascertained that his quitclaim from Shively was not sufficient to pass the after-acquired estate which the latter took under the donation act, and therefore, as a means of compelling him to make the same good, Welch may have threatened and probably did set up to be a "settler" on the land under the donation act. The effect of this claim was at least to embarrass and delay Shively in the assertion and maintenance of his right as such settler in the land office. Hence the so-called compromise by which Welch abandoned his opposition to Shively's claim to the donation, and the latter conveyed to Welch and wife with warranty that which he had quitclaimed to the former in 1850.

But even if Welch had been the "settler" on the land his wife had no interest in the premises until he had complied with the law so as to be entitled to the grant. His abandonment of the claim prior to that time was his own act and for his own benefit. She had nothing to relinquish or abandon. Lamb *v.* Starr, 1 Deady, 360; Vance *v.* Burbank, 101 U. S., 520.

But Nancy Welch having acquired these blocks 5 and 13 by a direct conveyance from Shively she "holds" them under him—in other words, she derives her title to them from him—and it is altogether immaterial who furnished the consideration for such conveyance. Because a husband for any reason—as love and affection or a sense of justice—furnishes the means to enable his wife to acquire property or even purchases the same outright and directs the conveyance to be made to her, she does not "hold" under him. Welch was not the owner of the property and she is not his grantee. They are not privies in estate; there is no devolution or transmission of any interest in the property from him to her. But she holds under the grantor in the conveyance through which she derives her title and right and to which her husband is a stranger.

It follows that Nancy Welch's representation or claim that the tide lands in question were not "held" by any person under a deed from her or any person under whom she "held" was true in point of both fact and law, and the commissioners did not err in preferring her as a purchaser to the plaintiff. The plaintiff is not entitled to any relief on this bill and the same is dismissed.

Mr. Frederick K. Strong for the plaintiff.

Mr. E. C. Bronaugh for the defendants.

(Signed) MATTHEW P. DEADY,
U. S. District Judge, Oregon.

Endorsed: Filed April 21, 1884. R. H. Lamson, clerk.

60 And afterwards, to wit, on the 17th day of April, 1886, there was duly filed in said court by the plaintiff an appeal, in words and figures as follows, to wit:

61 In the Supreme Court of the United States of America.

JOHN M. SHIVELY, Plaintiff and Appellant,
vs.
NANCY WELCH, JAMES W. WELCH, W. W. UPTON, and J. N. DOLPH, Defendants and Respondents.

Appeal from the Circuit Court of the District of Oregon to the Supreme Court of the United States.

To the Honorable the Supreme Court of the United States:

The appeal of John M. Shively, the above-named plaintiff and appellant, respectfully showeth that on the 25th day of November, A. D. 1882, the above-named John M. Shively filed his bill of complaint in the circuit court of the United States for the district of Oregon against the above-named Nancy Welch, James W. Welch, W. W. Upton, and Joseph N. Dolph to have the said defendants declared to be the trustees of the plaintiff for certain tide lands conveyed to the said Nancy Welch by the commissioners for the sale of school lands in the State of Oregon under and by virtue of the act of the Legislative Assembly passed on October 28, 1872, which said conveyance was made to the said Nancy Welch on August 28, 1876, said lands being known and described as block 111,

in front of shore block 13, and the west half of each of the blocks 41, 46, and 145, lying in front of the west half of block 5, in the town of Astoria, Clatsop county, Oregon, as laid out and recorded by John M. Shively, and of the alleged value of more than five thousand dollars; and the said Nancy Welch, on October 19, 1876, conveyed to the said W. W. Upton, J. N. Dolph, and James W. Welch an undivided one-fourth of the said premises, which said conveyance by Nancy Welch to the said James W. Welch, Joseph N. Dolph, and W. W. Upton was made without consideration and received by them with the full knowledge that said conveyance by the said commissioner to the said Nancy Welch was as to the said Shively fraudulent and void; that such proceedings were had in this cause that an amended bill of complaint was filed herein, to which said amended bill of complaint the said appellees filed a demurrer; and afterwards and on the 21st day of April, A. D. 1884, a final decree was made and pronounced therein by the said circuit court wherein it was decreed that the said John M. Shively was not entitled to any relief on the said amended bill, and thereupon the said amended bill was dismissed and judgment thereon was rendered against the said appellant, and that the said appellees have execution, which said decree of the said circuit court is, as this appellant is advised, —.

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Wherefore the appellant appeals from the whole of the said decree of said circuit court to the Supreme Court of the United States and respectfully prays that the said amended bill of complaint, demurrer thereto, and the proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew and that the said decree and every part thereof may be reversed and a decree made granting unto the said John M. Shively the relief prayed for in the said amended bill of complaint with the costs herein, or such other decree as — this cause may seem just to the Supreme Court.

J. M. SHIVELY.

F. D. WINTON,
Solicitor for Plaintiff and Appellant.

Endorsed: Filed April 17, 1886. R. H. Lamson, clerk.

63 And afterwards, to wit, on the 17th day of April, 1886, there was duly filed in said court a bond on appeal in words and figures as follows, to wit:

64 In the Circuit Court of the United States for the District of Oregon.

JOHN M. SHIVELY, Plaintiff and Appellant,
vs.
NANCY WELCH, JOSEPH N. DOLPH, W. W. UPTON, and JAMES W. WELCH, Defendants and Appellees.

Know all men by these presents that we, John M. Shively, of the State of California, and James Taylor and Isaac Bergman, of As-

toria, Oregon, are held and firmly bound unto the above-named Nancy Welch, Joseph N. Dolph, W. W. Upton, and James W. Welch in the sum of two thousand dollars, to be paid to the said appellees; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fifteenth day of April, 1886.

That condition of the above obligation is such that whereas the above-named appellant has prosecuted an appeal to the Supreme Court of the United States, at the city of Washington, in the District of Columbia, to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the district of Oregon: Now, therefore, the condition of this obligation is such that if the above-named appellant shall prosecute his appeal to effect and shall answer all costs if he fail to make his appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

J. M. SHIVELY. [SEAL.]
J. TAYLOR. [SEAL.]
ISAAC BERGMAN. [SEAL.]

Sealed and delivered and taken and acknowledged before me this April 15, 1886.

J. O. BOZORTH,
65 *Commissioner U. S. Circuit Court, District of Oregon.*

UNITED STATES OF AMERICA, }
District of Oregon, } ss:

I, James Taylor, and I, Isaac Bergman, being first duly sworn, depose and say that I am worth the sum of two thousand dollars over and above all my just debts and liabilities, exclusive of property exempt from execution, and that I am a freeholder and resident of said district.

J. TAYLOR.
ISAAC BERGMAN.

Subscribed and sworn to before me this April 15, 1886.

J. O. BOZORTH,
Commissioner U. S. Circuit Court, District of Oregon.

Approved:
DEADY, *J.*

Endorsed: Filed April 17, 1886. R. H. Lamson, clerk.

66 In the Circuit Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA, }
District of Oregon, } ss:

I, R. H. Lamson, clerk of the circuit court of the United States for the district of Oregon, certify that the foregoing is a true copy of

the record and of all proceedings, including the opinion of the court, in the cause in equity entitled J. M. Shively *v.* Nancy Welch *et al.*, defendants, in said circuit court determined.

In testimony whereof I hereunto subscribe my name and affix the seal of said circuit court, at Portland, in said district, this September 28, 1886.

[Seal United States Circuit Court, Oregon.]

R. H. LAMSON, *Clerk.*

Endorsed on cover: Oregon C. C. U. S. No. 305. J. M. Shively, appellant, *vs.* Nancy Welch, Joseph N. Dolph, W. W. Upton, and James W. Welch. Filed March 15, 1887.

IN THE

Supreme Court of the United States.

October Term, 1889.

NO. 305.

J. M. SHIVELY, Appellant,

vs.

JANE WELCH, J. N. DOLPH, W. W. UPTON, and JAMES W. WELCH.

Appeal from the Circuit Court of the United States for the District of Oregon.

BRIEF ON PART OF APPELLANTS.

JOHN H. MITCHELL,
Solicitor for Appellant.

McGill & Wallace, Law Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

October Term, 1889.

J. M. SHIVELY, Appellant,

vs.

NANCY WELCH, JOSEPH N. DOLPH, W. W. UPTON, and JAMES W. WELCH, Appellees.

Appeal from the Circuit Court of the United States for the District of Oregon.

STATEMENT OF CASE.

This cause was heard in the Court below on demurrer to amended bill. (See amended bill, record, pp. 15–22, inclusive, and demurrer to same, record, pp. 23, 24.)

The suit was brought by the plaintiff, John M. Shively, for the purpose of having the defendants, Nancy M. Welch, James W. Welch, Joseph N. Dolph, and W. W. Upton, declared to be the trustees of the plaintiff for certain tide lands conveyed to said Nancy Welch on August 28, 1876, by the Commissioners for the sale of school and tide lands in the State of Oregon, under and by virtue of an act of the Legislature of the State of Oregon, approved October 28, 1872, (Session Laws, 129,) the same being known as block numbered 111 in front of shore block numbered 13 in the city of Astoria and

State of Oregon, and the west half of each of the blocks numbered 41, 46, and 145, lying in front of the west half of block numbered 5 in said city, and of the alleged value of more than $5,000.

The Court below sustained the demurrer, rendering judgment against the plaintiff for costs. From this judgment the case is now before this Court on appeal, the question being, does the complaint make out a case? The amended complaint is as follows:

AMENDED COMPLAINT.

In the Circuit Court of the United States for the District of Oregon, in the Ninth Circuit.

To the judges of the Circuit Court of the United States for the district of Oregon, in the ninth circuit:

J. M. Shively, of San Francisco, and a citizen of the State of California, brings this his amended bill against Nancy Welch and James W. Welch, both residents of the city of Astoria, and citizens of the State of Oregon; J. N. Dolph, a resident of the city of Portland, and citizen of the State of Oregon, and W. W. Upton, a resident of the city of Washington, and a citizen of the District of Columbia, and thereupon your orator complains, and says—

That in the month of March, 1844, he was occupying and claiming to hold as a settler's right the following-described tract of land or land claim situate in the county of Clatsop and State of Oregon, namely, a certain land claim thereafter and more particularly bounded and described as follows, to wit, being parts of sections 8, 9, 16, and 17, in township 8 north, of range 9 west, being bounded and described as follows, to wit: Beginning at a point in the south bank of the Columbia river 13 chains and 13 links west and 40 chains and 24 links north from the quarter post between said sections 9 and 16, in township 8 north, of range 9 west; thence south 97 chains; thence west 81 chains and 4 links; thence north 74 chains and 20 links to the Columbia river; thence

with the meanders of said river north 28° 30′ east 3 chains 50 links; thence north 54° 30′ east 5 chains 50 links; thence north 87° east 4 chains 70 links; thence south 70° 30′ east 13 chains; thence south 34° 45′ east 7 chains 40 links; thence east 6 chains 20 links; thence
33 north 63° 30′ east 7 chains; thence east 6 chains; thence north 66° east 6 chains to meander post; thence north 43° 30′ east 3 chains 70 links; thence north 61° 15′ east 14 chains; thence north 50° 15′ east 19 chains 31 links to the place of beginning, containing 640.56 acres.

And in said month he laid off a large portion of said lands bordering on the Columbia river and extending back therefrom into town lots and blocks, numbered consecutively from 1 to 121, and mapped and platted the same, calling it "Plan of Astoria, laid off in March, 1844," commonly known as Shively's Astoria.

Second. That on the 18th day of April, 1845, your orator, by a certain instrument in writing under his hand and seal, bargained and sold to one James Welch all his right and title to one undivided half of said land and claim, excepting about twenty lots particularly specified in said deed.

Third. That prior to the 13th day of March, 1850, with the consent of the said James Welch, your orator added to said plat certain other blocks, numbered consecutively from 122 to 150, both inclusive, which said last-named blocks were located almost exclusively upon the shore of the Columbia river between ordinary high and low water mark.

Fourth. That on the 13th day of March, 1850, your orator and the said James Welch, at the time believing themselves to be each the owner of an undivided half of said lands, proceeded to divide the lots and blocks between themselves, so that each should be the separate owner of his part of said tract so far as the same had been mapped and platted into blocks and lots, and
34 for this purpose they mutually executed and delivered to each other instruments in writing under their respective hands and seals in the nature of quit-claim deeds, which, though informally drawn and executed, were then considered to be, and were, sufficient in law and equity to sever their respective interests in

the blocks and lots then laid out so far as the same had not prior to that time been sold or conveyed; and thereafter the said James Welch had no legal or equitable right or title in or to said so-called donation land claim except as derived under said instruments in writing of the date of the 13th day of March, 1850, as hereinabove set forth, and except as hereinafter expressly admitted and set forth.

Fifth. That after the passage of the act of Congress of the United States, entitled "An act to create the office of surveyor-general of the public lands in Oregon and to provide for the survey of and to make donation to the settlers of said public lands," approved September 27th, 1850, commonly known as the Oregon donation law, your orator, who then was, and for more than four consecutive years prior thereto, had been personally living upon and cultivating said lands, and who was a white male citizen of the United States, over the age of 21 years, a married man, and in all respects qualified and entitled to claim and hold the said land as a donation claim under said act of the 27th September, 1850, became and was, with the knowledge of the said James Welch, solely recognized in the Land Office of the United States as the proper claimant of the entire tract of land.

That your orator, from and after the said 27th day of September, 1850, and from and after the said act of Congress of that date hereinbefore referred to and specified, was the only person entitled to claim said donation land claim under said act and the laws of the United States; but the said James Welch continued wrongfully to claim rights in said donation land claim, and contested the application of your orator for a patent to said land, and divers disputes and controversies arose between your orator and the said James Welch in relation to the validity of said agreements of the 18th day of April, 1845, and of the 13th day of March, 1850, between them, hereinabove set forth, and for the purpose of settling such disputes and controversies, by putting the validity of said agreement of division of the 13th day of March, 1850, beyond question, your orator and the said James Welch, on or about the said 18th day of February, 1860, at which time your orator had completed his residence and cultivation and

had become entitled to a patent from the United States for the entire donation land claim under said act of Congress approved September 27th, 1850, entered into an agreement by which the said land was to be divided between them—that laid off in lots and blocks to be described by numbers and that portion which had not been mapped or platted into lots or blocks to be described by apt and proper boundaries; and it was further agreed that your orator, *in whom the legal title was* supposed to be, should, with his wife, convey to the said James Welch or to such other person as he should direct the lots, blocks, and land coming to him, whereupon, on the 18th day of February, 1860, and in order to convey to him the legal title then vested in the plaintiff, your orator, or his wife, Susan L. Shively, and to cure defects, if any, in the quitclaim deeds of the 13th day of March, 1850, and to confirm the same and without any further consideration, your orator and Susan L. Shively, his wife,

36 executed and delivered to the said James Welch their joint deed of general warranty against all persons, the United States excepted, for the following-described real property, part and parcel of the said donation land claim hereinabove first described: The west half of that certain two-hundred-acre tract of land in the southeast corner of our land claim in township 8 north, range 9 west, in the county of Clatsop and State of Oregon, which two-hundred-acre tract is bounded and described as follows: On the north by the town plat of Astoria, as laid out and recorded by John M. Shively; on the east by the east line of said land claim, on the south by the south line of said land claim, and on the west by a line parallel with the east line, so as to include two hundred acres; also the following lots and blocks in the said town plat of Astoria: Blocks 3, 7, 11, 22, 23, 27, 31, 35, 39, 45, 47, 51, 54, 58, 62, 66, 70, 74, 78, 82, 86, 89, 93, 97, 101, 107, 112, 114, 117, 118, 120, 122, 123, 124, 126, 127, 129, 130, 131, 133, 135, 136, 138, 140, 142, 144, 146, 148, 150 and lots 5 and 6, block 119; lots 5 and 6, block 134, and lots 1, 7, and 12, block 115.

And at the same time, as a part of the same transaction and for a like purpose, and for the same consideration and for none other, at the direction and upon the request of the said James Welch, your orator, with his said

wife, executed and delivered to the said defendant, Nancy Welch, who was the wife of the said James Welch, a like deed of general warranty for the following-described real property, the same being part and parcel of the said donation land claim of your orator hereinabove first described:

The east half of a certain two-hundred-acre tract of land in the southeast corner of our land claim, in township 8 north, of range 9 west, in Clatsop county, Oregon, which two-hundred-acre tract is bounded on the north by the town plat of Astoria, as laid out and recorded by said John M. Shively; on the east and south by
37 the boundary line of our said land claim, and on the west by a line parallel to the east line, so as to include two hundred acres; also the following blocks and lots in said town plat, namely: Blocks 5, 6, 9, 13, 15, 17, 21, 25, 29, 33, 37, 41, 45, 49, 53, 56, 60, 64, 68, 72, 76, 80, 84, 88, 91, 95, 99, 105, 109.

That the two deeds from your orator of the 18th day of February, 1860, hereinbefore referred to, were intended to be and *was* a full settlement of all the respective parties' claims to the land claim herein first described and were so received and accepted by the said James Welch, who, in consequence, withdrew the opposition which he had previously made to the claim of plaintiff to the patent for said land.

Sixth. That the said Nancy Welch paid no consideration whatever for the real property conveyed to her by said deed of February 18th, 1860, but the same was a gift from her said husband, nor did your orator or his said wife receive from said Nancy Welch at any time any consideration whatever for the lands conveyed to her by your orator and his said wife, Susan L. Shively, or was any consideration paid for said land by said Nancy Welch.

Seventh. That it was at the time of the division so made as aforesaid on the 18th day of February, 1860, intended by the parties to make a full, final, and equal division of all of said land claim, together with the appurtenances, including riparian rights upon the Columbia river, so that no future controversy could thereafter arise between them concerning any matter or thing growing out of their copartnership in said lands.

Eighth. That afterwards, on the 24th day of January,
1866, a patent from the United States for said
38 lands herein first above described issued to your
orator, granting and conveying to him the east half thereof and to the said Susan L. Shively, his wife, the west half thereof; that said block No. 111 of Shively's Astoria,—county, Oregon, is situated upon or in front of the west half of said land claim or that portion thereof set over to Susan L. Shively by the United States patent above set forth of date January 24th, 1866, and that the said blocks Nos. 41, 46, & 145 and the west half thereof are situated upon or in front of the east half of said land claim.

That on the 7th day of March, 1871, your orator and Susan L. Shively, his wife, for a valuable consideration, by a deed duly made, executed, and delivered, conveyed to one Milton Elliot all the lands, lots, blocks, fractional lots and blocks contained or embraced in the west half of the lands patented by the United States to John M. Shively and Susan L. Shively, his wife, on the 24th day of January, 1866, and being the same lands herein first above described, save and excepting from the operation of said deeds lots Nos. 5, 6, 7, 8, and 9, in block No. 114, block No. 116, and also 55 acres of land bounded on the north by the south line of the said town of Astoria, on the west by the western boundary line as described in said patent, on the south by the south boundary line described in said patent, and on the east by a line running due north and south to points in said southern boundary lines of said patent and the town of Astoria at a distance sufficiently far east in each of said last-named lines as to embrace 55 acres of land.

That on the 8th day of March, 1871, the said Milton Elliot, for a valuable consideration, by a deed duly made,
executed, and delivered, conveyed to this plaintiff
39 all the lands last above described and conveyed by
the deed of plaintiff and wife to Milton Elliot, above set forth, whereby your orator became vested with all the right, title, and interest of the said Susan L. Shively in and to the lands set over to her by said patent of the United States to John M. Shively and wife and of date January 24, 1866, excepting the lands reserved in said deed to Milton Elliott of date March 7th, 1871.

Ninth. That in the division of the lots and blocks aforesaid between the plaintiff, your orator, and the said James Welch the said blocks were recognized and treated each as a distinct and separate tract of land, with a street for a definite exterior boundary line on all sides of the block, as indicated upon the maps and plats hereinbefore referred to, and the several blocks partitioned to the said James Welch included in the said quitclaim deed to the said James Welch of the 13th March, 1850, hereinbefore described, were so known and described, as also in the warranty deeds of February 18th, 1860, from your orator and his said wife, one to the said James Welch and the other to the said Nancy Welch, and were at the time of making of the said several deeds of such partition noted, designated, and indicated upon the original map and plan of Astoria and the first addition thereto, and the blocks partitioned off to plaintiff were specially marked and indicated upon said map and plat by a blue shading, while those partitioned to the said James Welch were left plain.

Tenth. That block number 13, which in the deed of March 13, 1850, was assigned to the said James Welch and in the agreement of February, 1860, was assigned to the said James Welch, but was at his request conveyed to his wife, the said Nancy Welch, as is hereinbefore set forth, was represented on said map by which the division was made as an entire block, 300 feet square, bounded on the north by Wall street, on the east by West 4th street, on the south by Arch street, and on the west by West 5th street; but the same was situate partly above and partly below the line of ordinary high tide upon the bank of the Columbia river, as is more fully shown and represented in the plat hereto attached, marked Exhibit "A," and made a part hereof.

Eleventh. That block No. 111, which, by the deed of James Welch to your orator, was conveyed to your orator, was situate immediately in front or north of said block No. 13, and lies wholly below ordinary high tide and above ordinary low tide of said Columbia river, and was represented as a block of 300 feet square, bounded on the north by Cedar street, on the east by West 4th street, on the south by Wall street, and on the west by West 5th street, as will more fully appear by Exhibit "A" hereinbefore referred to.

Twelfth. That at the date that the title to said donation land claim became vested in your orator and in his wife, Susan L. Shively, and at the date of the United States Government official survey of said donation land claim, a large part or portion of said block number 13 was entirely above the line of ordinary high tide in said Columbia river, and a portion of said block number 111 and of Wall street, running east and west between said blocks 13 and 111, in said city of Astoria, was above the line of ordinary high tide in said Columbia river, all of which will more fully appear from the map or plat, hereto attached, marked Exhibit "B," and made a part hereof.

Thirteenth. That block number 5, which, in the deed of March 13th, 1850, was assigned to the said James Welch, and in the agreement of February, 1860,
41 was assigned to the said James Welch, and was at his request conveyed to his wife, the said Nancy Welch, as is hereinbefore set forth and represented on said map, by which the division was made, as — entire block of 300 feet square, bounded on the north by Hemlock street, on the east by East 4th street, on the south by Pine street, and on the west by East 5th street, and the same was, at the date that the title to said donation land claim became vested in your orator and his said wife and at the date of the United States Government official survey of said donation land claim, situate above the line of ordinary high tide upon the bank of the Columbia river and within the legal boundaries or meander line of said donation land claim, but that at the date hereof the line of ordinary high tide of said Columbia river is upon the south half of said block No. 5; all of which will more fully appear from the map or plat, hereto attached, marked Exhibits "C" and "D" and made a part hereof.

Fourteenth. That block No. 145, which, by the deed of James Welch to your orator, was conveyed to your orator, was situate immediately in front of or north of said block No. 5 and lies below the line of ordinary high tide of said Columbia river, and was represented as a block 300 feet square, bounded on the north by William street, on the east by East 4th street, on the south by Hemlock street, and on the west by East 3rd street.

Fifteenth. That a strip of land nearly the entire width

of Hemlock street of said city and included within the legal boundary lines of the donation land claim patented by the United States to your orator and his said wife separates and divides said blocks Nos. 5 and 145; all of which will more fully appear from the map or plat hereto attached, marked Exhibit D, and made a part hereof.

42 Sixteenth. That since the date that the legal title to said donation land claim became vested in your orator and his said wife and since the date of the United States Government official survey of said donation land claim the shore of said Columbia river at and in the vicinity of blocks 5, 13, 111, and 145 have been washed away for some distance south, and thereby the line of ordinary high tide in said Columbia river has moved south and over and upon the lands patented by the United States to your said orator and his wife.

Seventeenth. That on the 3d day of September, 1875, the said Nancy Welch, claiming to be entitled thereto under the act of the legislative assembly of the State of Oregon entitled "An act to providefor the sale of tide and overflowed lands on the sea shore and coast," approved October 28th, 1872, made application to the board of commissioners of the State of Oregon for the sale of school lands to purchase the tide lands lying in front of block No. 13, which included block No. 111, and also the tide lands in front of block No. 5, which included blocks Nos. 145, 41, and 46, falsely representing and pretending that she was entitled to the same as appurtenant to the said blocks Nos. 5 and 13 and representing in her application and accompanying affidavit that the same were not held by any person claiming by, through, or under her or under any one through whom she claimed title, well knowing that each and every of said pretences were false and untrue, and that your orator was the equitable owner of the same and entitled to purchase the same from the State, and on or about the 28th day of August, 1876, she obtained from said board of commissioners of the school lands of the State of Oregon a deed for all the tide lands in

43 front of said block No. 13, including said block No. 111; also all tide lands in front of the west half of block No. 5, including all the lands in the west half of blocks Nos. 145, 41, and 46.

Eighteenth. Your orator further alleges that at the

date of said application and up to and including the date of the execution of said deed by said commissioners of the State of Oregon he was an applicant in due form of law to purchase said block No. 111 and west half of blocks Nos. 145, 41, and 46, and was the only person entitled to purchase the same under said act.

Nineteenth. That during all the period aforesaid from the said 13th day of March, 1850, down to and including the time when the State deed was executed to the said Nancy Welch that your orator was in equity the owner of said block No. 111 and the west half of blocks Nos. 145, 41, and 46, and entitled to claim and purchase the same from the State of Oregon, all of which the said Nancy Welch then and during all of said period of time well knew and all of which she then and at all times had knowledge and due notice.

Twentieth. That the title of the said Nancy Welch to said block No. 111 and to all tide land north of the centre of said Wall street, the north boundary line of said block 13, and to all tide land lying north of the west half of block No. 5, north of the centre line of Hemlock street, the north boundary line of said block, is fraudulent and void as against your orator.

Twenty-first. That the said James W. Welch, J. N. Dolph, and W. W. Upton, on the 19th day of October, 1876, procured a deed from the said Nancy Welch each for an undivided quarter of said block No. 111 and the undivided quarter of the west half of said blocks Nos. 145, 41, and 46, and claim to hold their interest through her and not otherwise; that at the time they procured said title they paid no consideration therefor and well knew all and singular the premises, and that the said Nancy Welch had no right, title, or interest in said block No. 111 or in the west half of said blocks Nos. 145, 41, and 46, or in any of their appurtenances or to any of the tide land upon or in front of the same, and that the said conveyance from the State of Oregon was as to her with notice fraudulent and void, and that she held the legal title only for the use and benefit of your orator.

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Twenty-second. That the value of the property in controversy in this suit exceeds the sum of five hundred

dollars and that the same is about the value of five thousand dollars.

Wherefore your orator prays that the said Nancy Welch, James W. Welch, J. N. Dolph, and W. W. Upton may be restrained and enjoined from proceeding at law to obtain possession of said real property or in any manner interfering with your orator's possession thereof; that your orator may be adjudged and decreed to be the equitable owner of the same; that the said Nancy Welch may be decreed to have received said deed from the State of Oregon in trust for your orator, and that said Nancy Welch, James W. Welch, J. N. Dolph, and W. W. Upton be decreed to execute and deliver to your orator good and sufficient deeds conveying to your orator the title to said block No. 111 and the west half of said blocks Nos. 145, 41, and 46, and for such other and further relief as may be equitable and for his costs and disbursements.

And may it please your honors to grant unto your orator a writ of subpœna of the United States of
45 America, issuing out of and under the seal of this honorable court, directed to the said Nancy Welch, James William Welch, J. N. Dolph, and W. W. Upton, defendants, commanding them, on a day certain therein to be named and under a certain penalty, to be and appear in this honorable court, then and there to answer all and singular the premises and to stand to, perform, and abide such further order, direction, and decree as may be made against them.

And your orator, in duty bound, will ever pray, &c.

WM. STRONG,
F. R. STRONG, and
THOS. N. STRONG,
Solicitors for Complainant.

UNITED STATES OF AMERICA,
District of Oregon, Multnomah County, } *ss:*
State of Oregon,

I, F. R. Strong, being duly sworn, depose and say that I am one of the solicitors for complainant in the foregoing bill; that I have read the same and know the contents thereof; that I have knowledge of the matters in said bill stated and the same are true except as to those mat-

ters which are therein stated to be on information and belief, and as to those matters I verily believe it to be true; and the reason why I make verification to said bill is because my client, the complainant herein, is not at this time within this county.

F. R. STRONG.

Subscribed and sworn to before me this 16 day of May, 1883.

R. H. LAMSON, *Clerk.*
By G. G. GAMMANS, *Deputy.*

(Next follows "Exhibit A," "Exhibit B," "Exhibit C," and "Exhibit D.")

(Here follow diagrams marked pp. 46, 47, 48, & 49.)

50 (Endorsed:) Filed May 16, 1883. R. H. Lamson, clerk, by G. G. Gammans, deputy clerk.

BLOCKS 41 AND 46 ARE ELIMINATED FROM THE CASE.

While blocks numbered 41 and 46 are mentioned in the amended bill of complaint and made therein in a certain sense a part of the case, this was evidently an inadvertence in the pleader and at the commencement of the trial in the Court below, the bill as to these two blocks was, by consent of counsel for the plaintiff, dismissed. With this modification, therefore, the question in controversy is as to whether, under all the circumstances of the case as presented by the modified amended bill and demurrer thereto, the plaintiff is in equity and good conscience entitled to become the owner in fee of the whole of block numbered 111, and the west half of block numbered 145, as described and designated in such complaint.

It is admitted the defendant, Nancy Welch, is the owner by good and sufficient deeds of conveyance from plaintiff and patentee under and in pursuance of the divisions and arrangements made between plaintiff and

James Welch, the husband of said Nancy Welch, of blocks numbered 5 and 13. It is also conceded that Nancy Welch the defendant, has a deed of conveyance from the State of Oregon of all tide lands lying in front of said block numbered 13, and also for all tide lands in front of the west half of block numbered 5, the former including block numbered 111, and the latter including the west half of block numbered 145.

The Material and Important Averments of Amended Complaint.

It is made quite clear from the amended complaint:

1st. That the plaintiff, J. M. Shively, was, on, and prior to, April, 1845, a settler on the lands described in the amended complaint and that he had, prior to that date, to wit, in March, 1844, laid off a large portion of the same bordering on the Columbia River and extending back therefrom, into lots and blocks numbered consecutively from 1 to 121, and had mapped and platted the same, calling it "plan of Astoria laid off in March, 1844," and which was then and ever since commonly known as "Shively's Astoria."

2d. That on the 18th day of April, 1845, plaintiff by a certain instrument in writing under his hand and seal, bargained and sold to one James Welch, husband of the defendant, Nancy Welch, so far as he could do so, all his right and title to one undivided half of said land claim, excepting some twenty lots particularly excepted in the deed.

3d. That subsequently, and prior to March 13, 1850, the plaintiff, the said James Welch, acting in concert and consenting thereto, added to said plat other blocks numbered consecutively from 122 to 150, both inclusive, these being almost exclusively upon the shore of the Columbia River, between ordinary high and low water-mark.

4th. That on March 13, 1850, plaintiff and said James Welch, each believing themselves to be each the owner of an undivided half of said lands, proceeded to and did divide the said lots and blocks between themselves, so that each should be the separate owner of his part of said tract, so far as the same had been mapped and platted into blocks and lots for this purpose, on that date mutually executed and delivered to each other instruments in writing, under their respective hands and seals, in the nature of quit-claim deeds, which though informally drawn and executed were then considered to be and were sufficient in law and equity to sever their respective interests in the blocks and lots then laid out, so far as the same had not, prior to that time, been sold or conveyed.

5th. That this was the state of the case on September 27, 1850, the date of the passage of the act of Congress, commonly known as "The Oregon Donation Act," and with which this Court is thoroughly familiar, the same having been so frequently in its various phases under discussion here.

6th. That the plaintiff was in all respects a person entitled to take under said act; further that he was then a married man as was also James Welch, and plaintiff claiming under said act, was, with the knowledge of the said James Welch as appears from the complaint, recognized in the proper local Land Office of the United States as the proper claimant under said act of the entire tract.

7th. That although plaintiff was the sole person entitled to receive title to said tract under the provisions of said donation act, said James Welch pretended to claim rights therein and contested the application of plaintiff for patent to the same, which led to divers disputes and controversies between plaintiff and said Welch, involving

the validity of said agreements between them of dates April 18, 1845 and March 13, 1850.

8th. That on or about February 18, 1860, this defendant and said James Welch, the plaintiff, as appears from the complaint, having then completed his residence and cultivation on said land, as required by the terms of said act, and having become entitled to a patent for the same under and in pursuance of its provisions (the donation act of September 27, 1850, hereinbefore cited), in order to settle such disputes and controversies by putting the validity of said agreement of division of the 13th March, 1850, beyond question, entered into an agreement by which the said land, including all said blocks, not excepting those now in controversy, was to be divided between them, that portion laid off in lots and blocks to be described by numbers, and that portion which had not been mapped or plotted into lots and blocks to be described by apt and proper boundaries, it being agreed that plaintiff—the legal title of the whole of the tract then being in him—should, with his wife, convey to the said James Welch, *or* to such other person as he should direct, the lots, blocks, and land coming to him, and in pursuance of such agreement plaintiff and his wife, Susan L. Shively, on the said 18th day of February, 1860, in order to consummate said agreement and convey the legal title therein, vested in plaintiff or his wife, and to *cure defects*, if any, in the quit-claim deeds of 13th day of March, 1850, and to confirm the same, and without any consideration, executed and delivered to the said James Welch their joint deed of general warranty against all persons for these certain described portions of said tract-land undivided and lots and blocks, and part of which by said agreements had been listed or allotted to said Welch. And at the same time and as a part of the same transaction, and for like purpose and for the same consideration, and for none other, and at the request of the

said James Welch, plaintiff and his wife executed and delivered to the defendant, Nancy Welch, wife of said James Welch, a like deed of general warranty for certain other portions of said tract, including in part certain undivided interests and also certain blocks and lots, the lands and interests undivided in these two deeds, including the lots and blocks therein, being the same allotted and conveyed or attempted to be conveyed to James Welch by the deed of March 13, 1850.

9th. That the two deeds from plaintiff and wife of date February, 1860, were intended to be and were a full settlement of all the respective parties' claims to the land described in the complaint, and were so received and accepted by the said James Welch, who, complainant states, "in consequence withdrew the opposition which he had previously made to the claim of plaintiff to the patent for said land."

10th. That Nancy Welch, the defendant, paid no consideration whatever for the property conveyed to her by said deed of February 18, 1860.

11th. Included in the said deed to Nancy Welch were the said blocks numbered 5 and 13 described in the complaint.

12th. That by such division and agreement the plaintiff, J. M. Shively, was to retain and did retain the two blocks numbered respectively 111 and 145, described in the complaint, both of which blocks were at that time understood, as appears from the complaint, by both the plaintiff and James Welch, to be part and parcel of the lands included in the donation claim of plaintiff, either being in whole or in part within the meander line of the Shively donation claim, or a part thereof, by virtue of the riparian rights along said Columbia River attaching to the grantee of said claim—the plaintiff in this case—and were so treated, as appears from the complaint, by plaintiff, said James Welch and his wife, the defendant,

Nancy Welch, in the agreement made on the 18th day of February, 1860, and while no need, either warranty or otherwise, was necessary from James Welch and Nancy Welch, his wife, to Shively, the plaintiff, for the lands and blocks which, by virtue of said agreement of February 18, 1860, were to be retained by him, from the fact that the legal title was already in him (plaintiff) by virtue of his full compliance with the provisions of the Oregon donation act of December 27, 1850, although a patent, it is true, had not yet issued, but subsequently issued on the 24th day of January, 1866, yet undoubtedly a general warranty deed similar to the two executed by plaintiff and his wife—one to James Welch for certain portions of the tract, the other to Nancy Welch for certain other portions—was executed by Welch and wife to plaintiff for the blocks and lands so retained under said agreement by plaintiff, and while the allegations of the complaint are somewhat vague upon this subject, it is respectfully suggested that the fact is sufficiently averred, as will be seen by a reference to page 19 of the record, being the 11th statement of fact in the amended complaint, which reads as follows:

"11th. That block numbered 111, which by the deed of James Welch to your orator was conveyed to your orator, was situate immediately in front or north of said block numbered 13, c."

13th. That, as appears from the complaint, it was intended by all the parties to the agreement of February 18, 1860, to make a full, final, and equal division of all of said land claim not laid off in blocks as well as lots and blocks, together with the appurtenances, including riparian rights upon the Columbia River, so that no future controversy could thereafter arise between them concerning any matter or thing growing out of their copartnership in said lands.

14th. By the patent issued for this land claim the east half thereof was granted to the plaintiff, while the west half was assigned and granted to Susan L. Shively, plaintiff's wife; that said block numbered 111, of Shively's Astoria, is situate upon or in front of the west half of said land claim, and that said block 145 and the west half thereof is located upon or in front of the east half of said claim.

15th. That subsequently, about March 7, 1871, the complaint states, by means of proper conveyances through the medium of a trustee, the title of Susan L. Shively, wife of plaintiff, to said west half of said donation claim was vested in plaintiff, with certain exceptions, which do not affect this case.

16th. That block numbered 13, which in the deed of March 13, 1850, was assigned to the said James Welch, and in the agreement of February 18, 1860, was again assigned to him, was, at his request, conveyed to his wife, the said Nancy Welch, defendant. It was conveyed, as appears from complaint, as a block described as block 13 on a certain map, as being 300 feet square, and as bounded on all sides by streets—on the north by Wall street, on the east by West Fourth street, on the south by Arch street, and on the west by West Fifth street—the block being partly above and partly below the line of ordinary high tide upon the bank of the Columbia River as represented in plat marked "Exhibit A," which is made a part of the complaint (see record, p. 24).

17th. That block numbered 111, which by the deed of James Welch was conveyed to plaintiff in pursuance of the agreement of February 18, 1860, was situate immediately in front or north of said block numbered 13, lying wholly below ordinary high tide and above ordinary low tide of said Columbia River. It was also represented as a block 300 feet square, bounded on the north by Cedar street, on the east by West Fourth street,

on the south by Wall street, and on the west by West Fifth street, as appears from "Exhibit A" attached to the complaint (see record, p. 22).

18th. It further appears from the complaint that at the date that the title to such donation land claim became vested in plaintiff and his wife, and at the date of the United States Government official survey of said donation claim, a large part or portion of said block numbered 13 was entirely above the line of ordinary high tide in said Columbia River, and a portion of said block numbered 111, and all of Wall street which separated blocks 13 and 111, were above the line of ordinary high tide in said Columbia River. (See record, Exhibit B, p. 22.)

19th. That block numberd 5, assigned in all the agreements and deeds, including that of March 13, 1850, and that of February 18, 1860, to the said James Welch, and which was at his request conveyed to his wife, the defendant, Nancy Welch, was also represented and dealt with in the agreements, deeds, &c., as in entire block of land in Shively's addition to Astoria, 300 feet square, bounded on the north by Hemlock street, on the east by east Fourth street, on the south by Pine street, and was at the date that the title to said donation land claim became vested in plaintiff and his said wife, as well as at the date of the United States Government official survey of said donation land claim, situate above the line of ordinary high tide upon the bank of the Columbia River, and within the legal boundaries or meander line of said donation land claim, but at the commencement of this suit the line of ordinary high tide of said Columbia River is upon the south half of said block numbered 5. (See Exhibit C, 6 D, record, pp. 27, 28.)

20th. While block numbered 145 mentioned in complaint, which, as stated in the complaint, "by the deed of James Welch to your orator, was conveyed to your

orator, was situate immediately in front or north of said block numbered 5, lies below the line of ordinary high tide of said Columbia River, and was also represented and dealth with in the agreements and divisions referred to as a block, 300 feet square, bounded on the north by Williams street, on the east by Fourth street, on the south by Hemlock street, and on the west by East Third street—the two blocks, 5 and 145, being separated by Hemlock street.

21st. It is a further allegation in the complaint that a strip of land nearly the entire width of Hemlock street in said city of Astoria, and included within the legal boundary line of the donation claim, patented by the United States to plaintiff and his said wife, separates and divides said blocks numbered 5 and 145 (see "Exhibit B," *supra*). In other words, the averment is to the effect that a strip of land, marked Hemlock street, and nearly the whole width of that street, the full width at one end and at least one-half the width at the other, lies between block numbered 5, owned by defendant, Nancy Welch, and the meander line of the Shively donation land claim.

22d. It is further averred that since the date when the legal title to said land claim became vested in plaintiff and his wife, and since the date of the United States Government survey of said donation land claim, the shore of said Columbia River at and in the vicinity of blocks 13, 111, and 145, mentioned in the complaint, has been washed away clear some distance south, and thereby the line of ordinary high tide in said Columbia River has moved south, and over and upon the lands patented by the United States to plaintiff and his wife.

23d. The foregoing seems to have been the situation as to these blocks, respectively, and the ownership thereof, from the 18th day of February, 1860, until the 3d day of September, 1875, a period of over fifteen years and seven

months, when on the latter date said Nancy Welch, claiming to be entitled thereto under the act of the Legislative Assembly of the State of Oregon entitled "An act to provide for the sale of tide and overflowed lands on the seashore and coast," approved October 28, 1872 (Oregon Sess. Laws, 1872, p. 129), as amended by an act approved October 26, 1874 (Sess. Laws, 1874, p. 76), made application to the Board of Commissioners of the State of Oregon for the sale of school and tide lands, to purchase the tide lands lying in front of block numbered 13, which of course included the whole of block numbered 111, and also the tide lands in front of block numbered 5, which included block numbered 145, both of which blocks (111 and 145) were owned and claimed by plaintiff without protest, so far as appears from either James or Nancy Welch, or any other person, during the period last stated, over fifteen years. The complaint states that in this application Mrs. Nancy Welch falsely represented and pretended that she was entitled to the same as appurtenant to the said blocks numbered 5 and 13, representing in her application and accompanying affidavit that the same were not held by any person claiming by, through, or under her, or any one through whom she claimed title, well knowing, it is averred, at the time that each and every of said pretenses were false, and well knowing that the plaintiff was at the time the equitable owner of the same; and on or about the 28th day of August, 1876, she obtained from said Board of Commissioners a deed for all the tide lands in front of said block numbered 13, including said block numbered 111, and for all the tide lands in front of the west half of block numbered 5, including all the lands in the west half of block numbered 145.

24th. The complaint avers that the title of said Nancy Welch to said block numbered 111 and to all tide lands north of the centre of said Wall street, the north boun-

dary line of said block numbered 113, and which street separates blocks numbered 13 and 111, and to all tide land lying north of the west half of block numbered 5, north of the centre line of Hemlock street, which is the north boundary line of said block, said Hemlock street dividing said blocks numbered 5 and 145 is fraudulent and void as against plaintiff.

25th. It is further charged in the complaint that the defendants, James W. Welch, J. N. Dolph, and W. W. Upton, on the 19th day of October, 1876, procured a deed from the said Nancy Welch, each for an undivided quarter of said block 111 and the undivided quarter of the west half of block numbered 145, and claimed to hold their interest through Nancy Welch, and not otherwise. It is averred that at the time they procured said title they paid no consideration therefor, and well knew at the time that said Nancy Welch had no right, title, or interest in said block numbered 111 or in the west half of said block numbered 145 or in any of their appurtenances, or to any of the tide land upon or in front of the same, and that the said conveyance from the State of Oregon was as to her with notice fraudulent and void, and that she held the legal title only as trustee for plaintiff.

THE PRAYER.

The complaint concludes with a prayer for a decree, among other things, that Nancy Welch, the defendant, receive said deed from the State of Oregon in trust for plaintiff, and that said Nancy Welch, James W. Welch, J. N. Dolph, and W. W. Upton, be decreed to execute and deliver to plaintiff good and sufficient deeds, conveying to him the title to said block numbered 111, and the west half of said block numbered 145, and for such other and further relief as may be equitable, and for his costs and disbursements.

Assignment of Errors.

1st. The Court erred in holding that the determination of the tide-land commissioners, under the acts of 1872 and 1874, that the defendant, Nancy Welch, was entitled to be preferred as a purchaser of the tide lands in question, could not be questioned in this particular case.

2d. The Court erred in holding that the defendant, Nancy Welch, did not hold blocks 5 and 13, described in complaint, under her husband, James Welch, and in holding that she held the same within the meaning of the Oregon tide land statute under the plaintiff, Shively.

3d. The Court erred in failing to find that, inasmuch as the plaintiff Shively was the immediate grantor of defendant, Nancy Welch, and also the grantee of her husband, James Welch, of the tide lands in question, that therefore he had the preference right to purchase said tide lands from the State.

4th. The Court erred in failing to hold that the State tide land commissioners had erred in both the construction and application of the State statute under which they were acting.

5th. The Court erred in sustaining defendant's demurrer to plaintiff's amended bill, and in holding there was no equity in such amended bill.

Argument.

Assuming, for the present, that no question as to tide lands were involved in this controversy, but that the blocks in controversy, numbered 5, 145, 13, and 111, were located not on the river shore, but in the center of the donation claim of J. M. Shively, the plaintiff, what would be the effect of the three several agreements, transactions, and conveyances of the 18th of April, 1845, the 13th of March, 1850, and the 18th day of February, 1860? Are they sufficient, taken as a whole, to vest the

legal or equitable title in the plaintiff as against the defendant, Nancy Welch, to blocks numbered 11 and 145? All would agree at once that they are. In other words, the division conveyances of March 18, 1850, if they related to property, the title of which was in either one or the other of the parties to these agreements, however defective and informal they may have been, were validated by the agreement and conveyances of February 18, 1860.

THE DECISION OF THE CIRCUIT COURT.

The points upon which the Court below sustained the demurrer will first have consideration. The Court below held—

1st. That it appeared from the complaint that the defendant, Nancy Welch, held shore block No. 13 and the west half of shore block No. 5, within the meaning of the Oregon statute relating to the sale of tide lands, under the plaintiff, Shively, and not under her husband, James Welch, and that, therefore, excluding all equitable considerations, she, Nancy Welch, had a preference right under the Oregon statute to purchase from the State the tide lands in front of said shore block 13 and said west half of shore block 5; and

2d. That whatever the facts may have been in that regard, the question as to her rights, as a preferred purchaser, having been passed upon by the State Board of Tide Land Commissioners, that their determination or conclusion could not be questioned in the courts.

The above seemed to be the *sole* grounds considered by the Court below, and upon which the demurrer was sustained.

It is respectfully submitted, the Court below was in error as to both these propositions.

It is submitted, in view of the facts stated in the complaint, that the defendant, Nancy Welch, held the block and half-block above designated, not under plaintiff, Shively, but under her husband, James Welch, within the meaning of the words in the Oregon statute, "or any person under whom he holds."

The act of the Legislature of the State of Oregon in 1872, as amended by that of 1874, providing for the sale of the tide and overflowed lands of the State provides, among other things, as follows:

"And all applications to purchase tide lands by the owners of adjacent lands shall be accompanied by the affidavit of the applicant, setting forth the fact that such land is not held by any other person under a deed from said applicant, or any person under whom he holds."

Laws of Oregon, 1874, page 78, act Oct. 26, 1874.

Query. What is the precise meaning of this clause?

In the case at bar the defendant, Nancy Welch, holds blocks numbered 5 and 13, under one of two persons. She either holds under her husband, James Welch, otherwise under the plaintiff, J. M. Shively. The Court below held that she, Nancy Welch, held the blocks in question, not under her husband, but under the plaintiff, Shively, from whom she received the deed direct. In view of all the facts connected with this transaction, as disclosed in the complaint, this is, it is insisted, not a correct conclusion. From whom did she obtain these blocks if not from her husband? Most assuredly the plaintiff, Shively, never had any transactions with the defendant, Nancy Welch. He never sold her any blocks; no negotiations were ever carried on between the plaintiff and Nancy Welch. Nancy Welch never paid plaintiff, Shively, any consideration whatever for these blocks, or any other, so far as is disclosed by this complaint. Not at all. The whole business from the beginning to the

end—from the 18th day of April, 1845, when plaintiff bargained and sold to James Welch the one undivided half of the whole of his claim, down to the date of the final division and settlement on the 18th day of February, 1860, including the division deeds of March 13, 1850—and all of the transactions, sales, agreements, and divisions were between the plaintiff, J. M. Shively, and James Welch, the husband of the defendant, Nancy Welch. They each sold and conveyed property to the other, the consideration in each case being the deeds from the one to the other, but at the last moment when all the agreements had been made, the division of the land, including all the blocks consummated, and when on the 18th of February, 1860, the deeds were about to be exchanged, James Welch said to the plaintiff, Shively, "I desire you to convey a portion of these blocks to my wife instead of myself," and it was done. From whom, therefore, did the defendant, Nancy Welch, obtain these blocks if not from her husband? The gift, if you please to call it such, was from him and not from plaintiff. He purchased the property from the plaintiff, Shively; instead of having it all conveyed to himself, a portion of it, at his request, was conveyed to his wife directly, instead of to him, and from him to his wife. Whatever of consideration, whether of love and affection or otherwise, passing from defendant, Nancy Welch, for these shore blocks went to her husband and not to Shively; the consideration plaintiff received for these blocks came from James Welch by release upon his part of claim to other blocks, among them the tide land blocks in question, while nothing whatever by way of consideration passed from Nancy Welch to plaintiff. It is respectfully insisted, therefore, that the defendant, Nancy Welch, does not and never did hold blocks No. 5, and the west half of block 13, within the meaning of the provision of the Oregon statute (*supra*) under the plain-

tiff, but under her late husband, James Welch, and if that be true, that is the end of this case. If that be true, then the Tide Land Commissioners of the State of Oregon, as well as the Court below, misconstrued and misapplied the law, in holding that the defendant, Nancy Welch, did not hold under her husband. If it be true, as it is respectfully insisted it is, that she holds these blocks under her husband, James Welch, then it is clear that inasmuch as the plaintiff holds the tide land blocks, not only by virtue of his riparian rights as donee from the Government, but also under deeds from James Welch, the defendant, Nancy Welch, was not entitled to purchase the same from the State of Oregon, because in that view of the case tide land block 111, and the west half of tide land block 145, were held by plaintiff under deeds from Welch, the person under whom Nancy holds, and therefore Nancy had no preference right.

But suppose the other view is taken and it is admitted that the defendant, Nancy Welch, does not hold under her husband within the meaning of the Oregon statute, but that she does hold under the plaintiff, Shively, then it is respectfully insisted that the true meaning and spirit of the Oregon statute, would class the plaintiff with that class created by the statute whose rights to the tide lands are superior to the owner of the shore lands. Suppose the plaintiff, Shively, prior to the application of the defendant, Nancy Welch, to the Oregon Commissioners to purchase these lands, had transferred blocks numbered 111, and the west half of block numbered 145, to a third party, then it would be conceded that the defendant, Nancy Welch, could not, under the statute and the facts of the case, have truthfully made the affidavit required by the statute, because in that event clearly the assignee of the plaintiff would have been the holder of the tide land blocks under a deed, not from the applicant, it is

true, but directly from the person under whom she holds. Was it not, therefore, clearly the intention of this statute to protect the person making a conveyance of the shore lands, in his interest, in the adjacent tide lands as well as to protect his assignees therein? That his assignees are clearly protected beyond question by the wording of the statute is conceded. Will not the spirit and general scope and intention of the act protect him as well? In other words, may not the true meaning of the clause in the Oregon statute be arrived at by a wholly justifiable transposition, so as to read as follows:

"Setting forth the fact that such land is not held by any other person under a deed from said applicant, or that such land is not held by any person under whom he holds, or the assigns of any such person."

If this be the true meaning of the clause, as it is respectfully submitted it is, then clearly the plaintiff's right to the tide lands in question is, under the statute of the State, superior to that of the defendant, Nancy Welch, and in that view the tide land Commissioners of the State committed a grievous error, not in the determination of any question of fact, but in the construction of the law applicable to the case. And this being so, under the rulings of this Court, the decision of that tribunal, even conceding for the moment that its decisions are to have the same force and effect as those of land officers, may be reviewed and annulled by this Court.

The rule upon this question was clearly laid down by Mr. Justice Miller, in Johnson *v.* Towsley, 13 Wall., 83, who, in delivering the opinion of the Court, after admitting the general doctrine that when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others, and that the action of the Land

Office in issuing a patent for any of the public lands subject to sale, is conclusive of the legal title wherever this title must control, defines and limits the scope of judicial inquiry in such cases as follows:

"On the other hand, there has always existed in the courts of equity the power in certain classes of cases to inquire into and correct mistakes in which injustice and wrong in both judicial and executive action, however solemn the form which the result of that action may assume, when it invades private rights; and by virtue of this power the final judgments of courts of law have been annulled or modified, and patents and other important instruments, issuing from the Crown, or other executive branch of the Government, have been corrected or declared void, or other relief granted. No reason is perceived why the action of the Land Office should constitute an exception of this principle. In dealing with the public domain under the system of laws enacted by Congress for their management and sale, that tribunal decides upon private rights of great value; and very often, from the nature of its function, this is by a proceeding essentially *ex parte*, and peculiarly liable to the influences of fraud, false swearing, and mistakes. These are among the most ancient and well-established grounds of the special jurisdiction of courts of equity, just referred to, and the necessity and value of that jurisdiction are nowhere better exemplified than in its application to cases arising in the Land Office."

The rule was stated by Mr. Justice Field in the case of Shepley *v.* Cowan, 1 Otto, 340, in these words:

"If the officers of the Land Department err in the construction of the law applicable to any case, or if fraud is practiced upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts. * * * But, for mere errors of judgment upon the weight of evidence in the contested case before them, the only remedy is by appeal from one officer to another of the department, and perhaps, under special circumstances, to the President."

Substantially the same doctrine was stated by the late Chief Justice Waite in the case of Vance *v.* Burbank, 101 U. S., 519.

Inasmuch, therefore, as tide land block 111 and the west half of tide land block 145 were, at the date of the application of Nancy Welch to purchase from the State, "held," to use the term of the Oregon statute, by the person under whom Nancy Welch held shore black 5 and the west half of 13, if we are to accept the finding of the Court below as to the person under whom she did hold such blocks, it follows clearly that both the tide land commissioners and the Court below misconstrued and misapplied the State tide land act in holding that Nancy Welch had a preference or any right to purchase said tide lands from the State. But not only so, but in the event the Court below was in error in holding that Nancy Welch held under the plaintiff within the meaning of the Oregon statute, then the only other person under whom she could hold was her husband, James Welch, and as plaintiff held the tide land blocks, not only in riparian rights as owner of the donation land claim bordering on the river, but also under deeds of conveyance of March 13, 1850, and February 18, 1860, from James Welch, the person under whom in such view the defendant Nancy Welch held, therefore the plaintiff and not the defendant Nancy Welch was entitled to purchase such tide lands from the State of Oregon.

The Court below having reached the conclusion that the determination of the tide land commissioners was conclusive and could not be reviewed, except for error in the construction or application of the law, or for some fraud extrinsic and collateral to the contest by which plaintiff was prevented from having a fair and full hearing before such commissioners, and the Court having

failed to find that there was any such error or fraud, the case was consequently determined in the Circuit Court without any consideration whatever of the equities which it is insisted were presented by the amended complaint arising out of the various agreements, divisions and conveyances between the parties respectively, including the deed of April 18, 1845, that of March 13, 1850, and that of February 18, 1860, not excepting, of course, the grant of the donation claim from the United States to the plaintiff, Shively. These will now have consideration. But first, a word as to the powers and jurisdiction of the State Tide Land Board of Commissioners.

The Tide Land Commissioners had no Power to Deal with Equities.

The State Tide Land Commissioners had no power under the Oregon statute to deal with *equities*, or even to consider them, but only *legal* rights. Two questions and only two were presented for their consideration:

1. Whether the defendant, Nancy Welch, was the owner in fee of block numbered 13, and the west half of block numbered 5 described in complaint, and whether such blocks fronted on, were bounded by, or adjacent to, the tide lands in question; and

2. Whether the shore blocks lying in front of the same, or to be more accurate, whether the tide lands lying in front of the same—because it must be remembered the State Commissioners had no right to deal with *blocks* as such, but simply as *tide lands*—were not held by any other person under a deed from the applicant, Nancy Welch, or any person under whom she held. Having decided, as they did, these two propositions in the affirmative, they directed a deed to issue to the defendant, Nancy Welch, for the tide lands in front of the blocks owned by her, numbered 13, and the west half of block num-

bered 5, if as a matter of fact, Nancy Welch was the legal owner of block numbered 13, and the west half of block numbered 5, which is conceded, and furthermore, if it were a fact that all lands irrespective of any numbering of blocks, in front of these were tide lands, and if furthermore it was true as found evidently by the Commissioners that these tide lands were not held by any other person under a deed from her (Nancy Welch) or any person under whom she holds, and these facts were found by the commissioners, then the jurisdiction of the tide land commissioners extended no further except to render judgment upon these facts. Any *equities* that might exist in favor of the plaintiff as against Nancy Welch, as claimed in complaint, no matter how strong, could receive no consideration whatever at the hands of this *quasi* judicial tribunal. They were acting under a special statute. Their powers and jurisdiction were limited by the plain terms of the statute. Hence, their adjudication cannot be likened or compared to a decision made by officers of the United States Land Department, such as registers and receivers, the Commissioner of the General Land Office, &c., as invoked by the learned judge in the Court below, citing as authority, the cases of Aiken *v.* Ferry, 6 Sawyer, 79; Vance *v.* Burbank, 101 U. S., 519, and cases there cited.

The complaint in this case, while contesting, for reasons already stated, the validity of the findings of the commissioners, and while, for reasons stated, insisting on the right of the Court to review such findings, mainly on the ground of misinterpretation and misapplication of the State statute to the facts of this case, reaches over and beyond said board and its decision and action in giving Nancy Welch a deed from the State for the tide lands in question, and by the equities it presents, seeks to impose on the conscience of the defendants an obligation to transfer and convey to plaintiff whatever of right or title to the

premises in controversy may have vested in them in virtue of the conveyance from the tide land commissioners. Before passing to these general equities, however, a special vital point will have consideration.

Shore Block No. 5 did not Border upon nor was it Adjacent to the Tide Lands included in Block 145

The Court below overlooked what seems to be a vital question affecting, as it is believed, fatally the right of the defendant, Nancy Welch, to purchase the tide lands included in block 145, or any portion of it. The allegation of the complaint is—and this must be taken to be true for the purposes of this case—that block numbered 5 was a piece of ground 300 feet square bounded on each side by a street, and separated from block 145 by Hemlock street. It is clear that the defendant, Nancy Welch, in purchasing this block numbered 5, only acquired title in the direction of block 145 to the centre of Hemlock street—the title to that half of Hemlock street lying next to block 5 being subject, of course, to public use as a street. It further appears from the complaint that the meander line of the Shively donation land claim, whether run according to high or low-water mark, so runs with reference to the two blocks (5 and 145) as to include within the limits of such donation claim nearly the whole of Hemlock street at the one side of block 5, and considerably over half of such street at the other side of block 5. So that as stated in so many words in the complaint "a strip of land nearly the entire width of Hemlock street of said city of Astoria, and included within the legal boundary lines of the donation land claim patented by the United States to plaintiff and his wife, separates and divides said blocks numbered 5 and 145," and all of which as stated in the complaint will more fully appear from the map or

plat attached to the complaint, marked Exhibit "D," and made a part thereof. (See p. 29, record.) This being so, the owner of block 5, it is respectfully submitted, and it is conceded that the defendant, Nancy Welch, is the owner, or was, at the time of making application to the State Tide Land Commissioners, has not now and never had any right whatever under the Oregon statute to purchase the tide lands covered or included in block 145, and for the simple and plain reason that a strip of land never owned by the defendant Nancy Welch, but on the contrary owned by the plaintiff Shively, and lying above high-water mark, included in his donation claim for which he has a patent, the same never having been sold or conveyed by him so far as appears from the complaint, was at the date of the application of Nancy Welch to purchase from the State, owned by the plaintiff, Shively. And this strip of land separated by distinct boundaries blocks 5 and 145, and hence it was that the plaintiff, Shively, in so far as bock 145 is concerned, and *not* the defendant, Nancy Welch, was the owner of the shore land, namely, the strip of land just hereinbefore described and which was not tide land and which bordered, abutted, and fronted on the tide land included in block 145. In other words the plaintiff, Shively, and not the defendant, Nancy Welch, was at the date of her application to purchase the tide lands in front of block 5, the owner of the adjacent shore land bordering on the tide lands included in block 145. He was the owner of the land abutting, fronting upon, and bounded by the shore of Columbia River. (See sec. 1, act October 24, 1874, Laws of Oregon, 1874.) These are the undisputed facts as stated in the complaint, and which, it is respectfully submitted, are fatal to the claim of defendant, Nancy Welch, or any of her assigns with notice, to any part of the tide lands included in block 145, or to any portion of the lands lying between the centre of Hemlock street and low tide in the Columbia River.

The Equities.

But, conceding for the moment that the Tide Land Commissioners of the State of Oregon were correct in holding that the defendant, Nancy Welch, was the legal and rightful owner of blocks numbered 5 and 13, which is not denied, and conceding further that block numbered 111 and the west half of block 145 in controversy here, were not held by another under a deed from said Nancy Welch or any person under whom she holds, as conditioned in the Oregon statute relating to the sale of tide and overflowed lands, still, it is respectfully insisted, such adjudication does not, by any manner, foreclose plaintiff of his equitable rights and claim to the blocks last designated vesting in him, by reason of the various divisions, agreements, and conveyances set out in the complaint. Nor is he, it is respectfully submitted, by such decision of the commissioners in any manner estopped, even conceding their decison to have been correct, from insisting on the facts stated in this complaint, that the title thus acquired by Nancy Welch by virtue of her deed from the State should be declared to be held in trust by her for the use and benefit of the plaintiff.

By an instrument in writing under his hand and seal dated April 18, 1845, plaintiff then being a settler on the land described in the complaint, and which land subsequently ripened into a complete donation claim with plaintiff as donee under the donation act of September 27, 1850, bargained and sold to James Welch the undivided one-half thereof, including the one undivided half of all blocks (save a few lots specially excepted) laid off by him in March, 1844.

By the arrangements and deeds of March 13, 1850, these were divided between them by mutual consent. In this division James Welch gets blocks 5 and 13 described

in complaint, while plaintiff gets block 111 and the south half of block 145 in controversy. Were this the end of the agreements and transactions between these parties, had nothing further transpired, had no further conveyances passed between them, then, it might with some degree of propriety be claimed that, inasmuch as neither party could have title at the time of the transactions of April 18, 1845, and March 13, 1850, that, therefore, not only could no legal title pass, but no equities could be created by anything that had been done. But such is not the case. Ten years elapse; the donation act has come into existence, and the legal title to the whole tract in question has become vested in plaintiff by virtue of a compliance on his part with its provisions, when in order to validate and make legal and good the acts of the parties of April 18, 1845, and of March 13, 1850, they enter into further assurances with each other of the most solemn character, deeds of general warranty being severally executed and exchanged between them, and by these conveyances and agreements these same blocks 5 and 13, with many others, are again assigned to James Welch, but at his instance conveyed to his wife, while block 111 and the south half of block 145 are confirmed to plaintiff, both parties assuming and believing that all these four blocks were included within the limits of the Shively donation claim.

Any attempt therefore, it is respectfully submitted, upon the part of James Welch or his wife, Nancy Welch, who occupies his place, in so far as all questions connected with this controvesy are concerned involving any legal or equitable rights growing out of the tranasctions relative to these blocks, to purchase an outstanding title to block 111, and the south half of block 145, that is found to be superior to that of plaintiff, and with a view of setting up such title as against plaintiff is a fraud in law, upon the rights of the plaintiff and one which if success-

ful, ought not to be permitted to bear fruit for the benefit of the party perpetrating it; and equity and good conscience require that such parties should be deemed to be the holder of such superior title in trust for the plaintiff. That is this case in one of its principal phases, and one which seems to have been overlooked, or lost sight of, by the Court below.

In this case, and as applicable to it, the doctrine enunciated by Mr. Justice Story in his Equity Jurisprudence is invoked, Section 1265, wherein he says:

"In the consideration of fraud, whether actual or constructive, Courts of Equity have adopted principles exceedingly broad and comprehensive in the application of their remedial justice and especially where there is fraud concerning property, they will even interfere and administer a wholesome and sometimes even a strict justice in favor of innocent persons who are themselves without fault in the transaction."

Equity Jurisprudence, Sec. 1265.

The complaint in this case shows very clearly an attempt upon the part of Nancy Welch, the defendant—and for all the purposes of this case she represents her husband, James Welch and takes blocks 5 and 13 with every equity attaching or that did attach as between James Welch and plaintiff—to secure title to property which she and her husband had in divers manners covenanted and agreed with plaintiff was his property. The division of February 18, 1860, alloted blocks 111 and 145 to plaintiff, all parties believing that title to the same was in him. Any attempt therefore, to deprive him of that title by parties participating in the division and releasing him from it, is nothing less than a fraud in law and defendants are estopped in equity from reaping the fruits of it.

A party obtaining a grant or patent from the State to

lands which equitably belong to another, will hold the legal title in trust for that other.

33 Cal., 262–263.
20 Ark., 664.
38 Cal., 90.
30 Cal., 306 and cases cited.
6 Oregon, 26.

ESTOPPEL.

It is respectfully submitted the defendant, Nancy Welch, as also her co-defendants, are by her acts estopped from denying plaintiff's equities, and from resisting the claim that she or her co-defendants holds the legal title to the tide lands in question in trust for plaintiff.

The doctrine seems to be established by authority that the conduct, as also the admissions of a party, operate against him in the ~~notice~~ of an estoppel whenever in good conscience and honest dealing he ought not to be permitted to gainsay it or them.

Lawyers' Reports Annotated, Book I, page 523, and numerous cases cited in notes.
Durheen *v.* Colgrove, 100 U. S., page 578.

Wilful fraud on the part of the party sought to be estopped in the act constituting the grounds of the estoppel is not an essential of the application of the doctrine of estoppel.

Id.

Wherever statutes enable a married woman to enter into contracts as though single there is no reason why the doctrine of estoppel should not apply to her without any limitation.

Dengees *v.* Clancy, 67 Barb., 566.
Freyer *v.* Rishel, 84 Penna., 521.
Towles *v.* Fisher, 77 N. C., 437.
Godfrey *v.* Thompson, 46 Wis., 677.
Lawyers' Reports Ann., Book 1, page 523, and notes.

And a married woman may even thus be estopped by the acts of her husband.

McCae *v.* Woolf, 47 Ala., 389.
Badue *v.* Killen, 53 N. Y., 93.
Hockell *v.* Bailey, 86 Ill., 74.

But independently of legislation there is a decided preponderance of authority sustaining the estoppel against her, either where she is attempting to enforce an alleged right or to maintain a defense.

Bigelow *v.* Fass, 59 Me., 162.
Frazer *v.* Gelsten, 35 Md., 298.
Brinkerhoff *v.* Brinkerhoff, 23 N. J. Eq., 477.
Carpenter *v.* Carpenter, 25 N. J. Eq., 483.
McCullogh *v.* Wilson, 21 Pa. R., 136.
Lawyers' Rep. Ann., Book 1, page 524, and notes.

FOR THE PURPOSES OF THIS SUIT, NANCY WELCH, THE DEFENDANT, MUST STAND IN PRECISELY THE SAME POSITION AS WOULD HER HUSBAND, JAMES WELCH, HAVE STOOD, HAD THE DEED TO BLOCKS 5 AND 13 BEEN MADE TO HIM INSTEAD OF TO HER.

I.

It cannot be maintained that the defendant, Nancy Welch, in reference to her claim to the lands in controversy is any different, better, or stronger in any sense than would the claim of her husband, James Welch, have been to the same lands, provided both deeds of February 18, 1860, had been made to him instead of only one—the other having been made to his wife, Nancy Welch, at his instance and request. She is not an innocent purchaser in any sense of the term. The consideration of the lands and blocks conveyed by plaintiff and his wife to Welch and his wife, by the deeds of February 18, 1860, was the retention free from further controversy and dispute or

claim upon the part of James Welch and his wife of the lands, and blocks and lots retained by the plaintiff, Shively, under and by virtue of the agreements and deeds of March 13, 1850, and February 18, 1860. If through any wrongful, unconscionable, or inequitable act upon the part of either Welch or his wife, consummated at any time after the receipt by them of their warranty deeds for their portion of the divided property, the plaintiff had been deprived of his title to the property retained by him in that division; if, in other words, they had made the discovery that there was an outstanding title to all the lands retained by plaintiff and his wife, that was superior to the title under which he held, and had surreptitiously, wrongfully, and fraudulently, in violation of the spirit of the agreements and conveyances of March 13, 1850, and February 18, 1860, acquired that title with the purpose and intention of depriving plaintiff of all right to the property thus retained by him under such agreements and conveyances, is there any court of equity having jurisdiction that would hesitate for a moment in decreeing that the outstanding title thus acquired should be held in trust for the benefit of the plaintiff?

That, if the Court please, is this case. All the parties to the division and agreement of February 18, 1860, which was but a carrying out and ratifying of the agreement of March 13, 1850, that is to say, plaintiff, Shively, James Welch, and the defendant, Nancy Welch, believed, and acted upon the belief at the time of making these several engagements, that block numbered 111 and the west half of block numbered 145 were as much a part and parcel of the donation land claim of the plaintiff, Shively, as were the blocks numbered 5 and 13 or any other portion of such claim, and they should be held in equity to their agreements, and any successful attempt to acquire any outstanding title to the blocks claimed by plaintiff superior to that held by him, is in direct fraud

of such agreements, and the titles so acquired should be declared to be held in trust by the defendant, Nancy Welch, for the benefit of plaintiff.

Conceding, for the present, that the lands lying between the meander line of the donation claim and the river, remained tide lands at the date of admission of the State, and were such on the 18th day of February, 1860, when the division was made of blocks between Shively and Welch, and supposing neither Shively nor Welch had any control over, or any right to deal with those lands, still in that view it is clear that both plaintiff and Welch *believed* at the time of these arrangements and divisions between them that they had the right to contract with reference to them—I mean with reference to blocks 111 and 145, and they did act in their negotiations and divisions upon the assumption that they were included in, and were a part of, the donation claim of plaintiff; and in the division these two blocks counted as a credit to Welch and a part payment to plaintiff, Shively, just as far, to the same extent, as though there had been no question at all in regard to the title, or in regard to their right to contract with reference to them. In other words, for the block numbered 5, which Welch received, and which was, at his instance, conveyed to his wife, the plaintiff received a block of similar size, numbered 145, and only separated from the former by a street.

Again, as the division proceeded, for block numbered 13, which Welch received and which was at his instance conveyed to his wife, the plaintiff received block numbered 111, a block of similar size and separated from the former by a street (Wall street). These parties in this division undoubtedly, as appears from the complaint, proceeded on the assumption that Shively had the legal title to the whole claim and to all these blocks. Had it been otherwise, it is hardly probable that the

plaintiff, Shively, would have accepted blocks 13 and 145, to which neither of them had any title, while giving to Welch blocks 15 and 13 to which the plaintiff had the legal as well as the equitable title.

This being so, the question arises, what equity would there be created as between Shively and Welch if subsequent to this, Welch had proceeded to buy in an outstanding title to blocks numbered 111 and 145, and set up that title as against the claim of the plaintiff? In view of this state of the case, would any court of equitable jurisdiction hesitate for one moment to hold that Welch under such circumstances was the trustee of whatever interest or title he received by this purchase from a third party, or hesitate to compel him on proper application to give Shively the benefit of such interest. And if this is so in reference to Welch, it is equally so in reference to his wife the defendant, Nancy Welch.

Nor will it do on the part of the appellee to say that none of the parties to these transactions had, prior to the admission of the State into the Union, any right to exercise any acts of ownership over, or make any claim to, these tide lands or the lands included between high and low-water mark at the point of the location of this donation claim. The truth is, the Oregon statute is an answer to any such suggestion. The statute proceeds upon the theory that parties may have exercised acts of ownership over such land; may have made claim thereto; may be *holding* the same, to use the words of the statute, *prior* to any sale or exercise of ownership of the same upon the part of the State. The act had two purposes in view—first, to provide a means of disposing of the tide lands of the State, and second, to protect persons in their equitable rights who might be found to be *claiming* and *holding* the same, and while the right to the shore owner to purchase the same is preferred under certain circumstances, no such preference or right is given, or in fact any right as

against a person holding the same under a deed from the applicant to purchase tide lands or from any person under whom he holds.

It is submitted, therefore, that the State act itself is in its provisions a direct recognition of the claims of the plaintiff to the tide lands in question.

Act Oct. 24, 1874, Laws of Oregon 1874, p. 78.

In Parker *v.* Rogers, 8 Oregon, 190, the Supreme Court by Boise, Justice, in discussing this question, and the purposes and effect of the State title land, act of 1872, as amended by the act of October 28, 1874 (see laws of Oregon 1874, page 77), said:

"Though the State was under no legal obligation to recognize the rights of either the riparian owner or those who had occupied these tide lands, still the legislature, considering the fact that these lands had been dealt with as private property, and improved sometimes by the erection of expensive structures, which were a great advantage to commerce, made, what we think, wise and just provisions for the protection of those who had spent their money in purchasing and improving these lands, which improvements were in many cases absolutely necessary as aids of Commerce."

Parker *v.* Rogers, 8 Oregon, 190.

WERE NOT THE TIDE LANDS IN QUESTION INCLUDED WITHIN THE LIMITS OF THE DONATION GRANT TO SHIVELY?

The doctrine, it is believed, has been clearly established that all the lands within the Territories of the United States, including lands on the shores between high and low-water mark, over which the tide daily ebbs and flows, belong to the United States as proprietor, and are subject to its jurisdiction as sovereign. The question, however, as to the power of the General Government, by virtue of such proprietary interest to grant or otherwise

dispose of the title to the soil of tide waters as other public lands, has not been so clearly established by this Court. Upon the one hand, it has been insisted that the General Government may, by virtue of such proprietary interest, grant or otherwise dispose of the title to the soil of tide waters in the same manner and to the same extent as other public lands, at any time prior to the date when such Territory passes into the condition of Statehood, while upon the other hand, the contention has been that, while the legal title to all lands in the Territory, including lands known as tide lands, is in the United States, and subject to its jurisdiction as sovereign; that it holds such title merely as trustee for the people, and that such lands are not subject to disposal by the General Government, but must be held for the use and benefit of the future State. I do not understand that the precise question involved in the issue thus presented has ever yet been directly decided by this Court.

In a California case Justice Field says:

"Although the title to the soil under the tide-waters of the bay (San Francisco) was acquired by the United States by cession from Mexico equally with the title to upland, they hold it only in trust for the future State. Upon the admission of California into the Union upon an equal footing with the original States, absolute property in, and dominion and sovereignty over, all soils under tidewaters within her limits passed to the United States."

But in Barney *v.* Keokuk, 94 U. S., 328–338, the question was left open, Justice Bradley saying in speaking of surveys by the General Government:

"All lands adjoining navigable fresh rivers of the west properly belonged to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its surveys and grants beyond the limits of high water."

Gould on Waters, p. 92.

In Hinman *v.* Warren in Oregon it was held that the United States while holding the title to the soil of tide-waters cannot make a valid conveyance of said soil.

Gould on Waters, p. 31, Sec. 40.
Hinman *v.* Warren, 6th Oregon, 408.

There is also data to this effect in the case of Haight *v.* Keokuk, 4th Iowa, 199–213, but Hinman *v.* Warren appears to be the only adjudication on the subject. According to this view the United States holds purely as trustee for the future state, and is without statutory or constitutional authority to do any act making it impossible to admit the new State upon a footing equal in all respects with that of the other States.

The decision of the Supreme Court of the United States, says Gould on Waters, have been thought to lead to the conclusion reached in Hinman *v.* Warren, 6th Oregon, 408–411, but it would seem that there is no very direct expression of such view in the opinions of that Court.

See Weaver *v.* Harbor Commissioners, 18 Wall., 57–65.

In the case of Irvine *v.* Marshall, 20 How., 561, this Court said:

"It cannot be denied that all the lands in the Territories not appropriated by competent authority before they were acquired are in the first instance the exclusive property of the United States, to be disposed of to such persons at such times and in such modes and by such titles as the Government may deem most advantageous to the public use or in other respects most politic."

The above authority would seem to make no exception as to tide lands or any other character of lands in the Territories. "All the lands in the Territories," says the opinion, may "be disposed of to such persons, at such times and in such modes and by such titles as the Gov-

ernment may deem most advantageous to the public use or in other respects most politic." There is no inhibition, no limitation, nothing to limit this right of sale to what are sometimes termed "public lands" as contradistinguished from lands generally, but *all* the lands in the Territories are the exclusive property of the United States and subject to sale by the General Government under the grant in the Constitution authorizing the Congress to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States.

It is not questioned by this contention that upon the admission of the State into the Union such beds and shores *not otherwise disposed of by the United States*, became the property of the State in its sovereign capacity, and subject to its jurisdiction and disposal as has been held frequently, I believe, by this Court.

Pollard *v.* Hagan, 3 How., 238.
Barney *v.* Keokuk, 94 U. S., 336.
Shively *v.* Parker, 9th Oreg., 504.

This grant, it will be remembered, was made by the United States to the plaintiff, Shively, and the legal title to which became vested in him *prior* to the admission of Oregon as a State in the Union. Oregon was admitted as a State on the 14th day of February, 1859. Shively, the plaintiff, was a settler on this claim long prior to the date of the passage of the donation act (September 27, 1850), as appears from the complaint. On the passage of that act he immediately made claim under its provisions and had complied with all the provisions of the act long prior to the admission of Oregon as a State. The legal title to the Shively donation claim, with every appurtenant right legally and properly attaching thereto, whether riparian or otherwise, had been disposed of by the United States, and had vested in the plaintiff, Shively, long prior

to February 14, 1859—the date of the admission into the Union of Oregon as a State.

It is respectfully submitted when title to the donation claim in question vested in Shively, the claim, as stated in the complaint (see Record, p. 15), lying on the shore of the Columbia River, the survey lines thereof, running, so far as the claim relates to the property in controversy, with the meanders of said river, he, Shively, the plaintiff, became as to all the world the owner of all lands to low-water mark, or in any event the owner by virtue of riparian rights to all lands, whether tide or otherwise, lying between the meander line of the donation claim and extreme low-water mark.

In assuming this position the rule that land in the Territory of Oregon, including the beds and shores of the navigable waters below ordinary high tide or water, belonged prior to the admission of the State into the Union to the United States as proprietor, and was subject to its jurisdiction as sovereign, is invoked.

When, therefore, Congress disposed—to use the language of the Constitution on the subject of the disposition of the public lands—of this part of the public domain, the United States was the proprietor of all the tide lands within the then Territory of Oregon, and they were subject to the jurisdiction of the United States; and the grant, it is submitted, to Shively, of a claim lying on the shore of the river, the boundary line of the claim running according to the meanders of the river, carried with it, by riparian right—if not by virtue of being included within the limits of the grant—*all* the lands that could in any sense, or under any construction, be regarded as tide lands, lying between that meander and the waters of the river.

When a deed, survey, and patent show a river to be one of the boundaries of a tract, it is a legal deduction that there is no vacant land left for appropriation between the river and the river boundary of such tract, and all the riparian rights incident to the ownership of the shore or bank passed to the grantee, unless clearly reserved.

Gould on Waters, p. 342.

Richardson *v.* Prentiss, 48 Oregon, p. 88.

"When riparian estates are conveyed the owner may reserve the lands under water, but the general presumption in all cases is that the purchaser's title extends as far as the grantor owns."

Gould on Waters, p. 344.

"In Holbert *v.* Edens, in Tennessee, it was held that the purchaser, at a stipulated price per acre of land which is bounded by the *meanders* of a river, is only required to pay for the land bounded by a line running with the *ordinary low-water mark*, and no islands which may be between that line and the thread of the river, and *not* for the river bed."

Gould on Waters, p. 344.

The contention is, therefore, that these tide lands had been disposed of by the United States prior to the admission of Oregon as a State in the Union, and that subsequently the State acquired no interest whatever as tide land or otherwise to the blocks in controversy, and that the deed from the State Tide Land Commissioners to Nancy Welch did little more than create a cloud on the plaintiff's title to the property.

It is insisted the right of a State is only a sovereign right, attaching when the State becomes a sovereign by reason of being admitted into the Union. That prior to that time the United States is the sovereign, and has all

the powers which the State subsequently acquires, which is the right as is contended by plaintiff to dispose of the legal title to the tide lands as well as other public lands. In this case the right of the United States having been exercised and the land disposed of before the admission of Oregon as a State in the Union, the State never acquired any rights whatever to the lands in question.

Pollard *v.* Hagan, 3 Howard, 212.

IT WAS THE RULE OF THE LAND DEPARTMENT TO INCLUDE IN PUBLIC SURVEYS OF DONATION CLAIMS ALL LANDS TO LOW-WATER MARK.

Whatever the power may be on the part of the United States to extend the public surveys and the limits of its public grants beyond the line of ordinary high-water mark on the shores of tidal rivers and down to the line of low-water mark thereon, or whatever may have been the practice upon the part of the Land Department with reference to its extension of surveys in this respect of the public lands in the different States, it is a fact publicly known and one it is presumed of which this Court will take judicial knowledge, that in so far as the Territories of Oregon and Washington are concerned in the survey of donation claims under the Oregon Donation Act of September 27, 1850, all such surveys were, down to the year 1875, directed by the Land Department to be extended to *low-water mark*. This rule was established by the Commissioner of the General Land Office in August, 1853. The public records of the Land Department show that on the 25th of August, 1853, Hon. John Wilson, then Commissioner of the General Land Office, wrote a communication to H. A. Goldsborough, Esq., Olympia, Thurston County, Territory of Washington, of which the following is a copy:

[Copy.]

(Enclosed in the foregoing letter.)

GENERAL LAND OFFICE,
August 25, 1853.

H. A. GOLDSBOROUGH, Esq.,
Olympia, Thurston Co.,
Territory of Washington.

SIR: Your letter of 18th June last, was received on 16th inst. In that letter you state as follows:

"The tides throughout the sound (Puget's), rise and fall from *14* to *22* feet—the consequence is that, at low-water, a considerable quantity of land (generally marshy and valueless) is frequently exposed—although this tide land is or may be worthless or unimprovable except for ferries or fisheries, still it would be seriously injurious to a resident on 'high lands' from high-water mark upwards, if an immigrant should locate his claim in front of him between high and low-water mark; the information I (you) desire from the Department therefore is, must a settler bound his claim by *low-water* mark, necessarily including in the quantity he may be entitled to, a portion useless to him and thus deprive him of the full benefit of the provisions of said act, or may he bound his claim by *high*-water mark, and thus owning the '*high lands*,' will he not, to the utter exclusion of others, own down to low-water mark, without having the number of acres covered by the daily ebb and flow of the tide, charged to him by the Surveyor-General, as so much land granted him by the Government under the donation act referred to?"

In reply to the foregoing quotation from your letter, I have to inform you that the public surveys will be made to *low-water* mark, as nearly as practicable, and I understand you to mean that the land occupied by the daily ebb and flow of the tide, though unimprovable or useful for other purposes, may, nevertheless, become valuable for "*ferries or fisheries.*" To *add* such portions of land (although periodically covered by water) to the specific quantity of the settler's donation, making him a gratuity of the same, and thereby making such localities, however valuable they may hereafter become, available *only* to such settler, to the disadvantage of others who possibly

hereafter might desire to acquire title to and use them for the specific and valuable purposes referred to, is not conceived to be within the scope and meaning of the donation law; and therefore the settler claiming the benefits of that law, will have to make his location of quantity accordingly, and as he may elect under such circumstances; and if his location include the water privilege he will assuredly exclude another from interfering with him; but, if otherwise, he may not.

I am, very respectfully,
Your obedient servant,

(Signed) JOHN WILSON,
Commissioner.

And on the following day August 26, 1853, the following communication enclosing a copy of a letter to the Surveyor-General of the Territory of Washington was addressed by him to John B. Preston, Esq., Acting Surveyor-General of the Territory of Oregon:

[Copy.]

GENERAL LAND OFFICE,
August 26, 1853.

JOHN B. PRESTON, ESQ.,
Acting Surveyor-General,
Oregon City, Territory of Oregon.

SIR: Enclosed is a copy of a letter addressed to H. A. Goldsborough, Esq., of Olympia, Thurston County, Territory of Washington, in reply to a letter of inquiry from him dated 18th June last, in relation to the location of the donation claims of settlers in the immediate vicinity of Puget's Sound, where it is stated that the tides rise and fall from *14* to *22* feet. The public surveys are to be made to *low-water* mark, as nearly as practicable, and Mr. Goldsborough, you will perceive, has been so informed, and you will be governed accordingly.

I remain very respectfully,
Your obedient servant,

(Signed) JOHN WILSON,
Commissioner.

This rule was never changed, so far as the State of Oregon was concerned, until the 14th of April, 1875, when in a communication addressed to Benj. Simpson, Esq., Surveyor-General of the State of Oregon, by Hon. S. S. Burdette, then Commissioner of the General Land Office, the former was instructed as follows:

"You will also instruct your deputies when surveying lands bounded by waters affected by the ebb and flow of tides, to extend the lines of surveys only to high-water mark."

It is undoubtedly a fact, therefore, that the public surveys of all donation claims in the Territory and State of Oregon lying on tide waters prior to the year 1875 were extended to low-water mark, and this appears from the allegations of the complaint to have been the case with reference to the donation claim of the plaintiff. In the description of the claim on the first page of the complaint (Record, p. 15), after describing certain boundary lines, it says:

"Thence north 74 chains and 20 links to the Columbia River;" and then in describing that boundary of the claim lying on the river it states as follows:

"Thence with the meanders of said river north 28 degrees 30 minutes east," and so on.

While this description is not conclusive as to just where the meander line did run, it is quite apparent from the whole case that it was run at *low-water mark*.

LACHES.

The demurrer in this case raises the question of *laches* upon the part of plaintiff in not sooner asserting his equities, but this, in view of the facts of this case and the rules of law applicable, will hardly be insisted on.

The defendant, Nancy Welch, obtained her deed from the State of Oregon for the tide lands in question August

28, 1876. This suit was commenced August 12, 1882, just 16 days less than six years from the time when the cause of suit accrued. It is believed no case can be found in the reports of any court—certainly not in the reports of this court—where a delay of less than six years in bringing suit to enforce equities involving title to land has been held to be such *laches* as would estop the plaintiff from asserting his claim.

In the Courts of Equity, *laches* in the pursuit of remedies had always been discountenanced, even before limitations had been prescribed by legislative enactments.

Buswell on Limitations and adverse possession, page 28, Sec. 18.

And since the time when actions in the courts of common law were subject to limitations, the Equity Courts have generally applied these to similar cases within their own jurisdiction.

Buswell on Limitations, &c., and authorities there cited, page 28, Sec. 18.

The Statute of Limitations in the State of Oregon, in reference to actions to recover real property, is ten years.

See Oregon code.

Courts of Equity apply the rule of *laches* according to their own ideas of right and justice. Every case is governed chiefly by its own circumstances.

Train Lick Oil Co. *v.* Marburg, 91 U. S., 587.
Sullivan *v.* Portland & K. R. Co., 94 U. S., 806.
Brown *v.* Buena Vista Co., 95 U. S., 157.
Lawyers' Rep. Ann., page 191, and notes.

It is true it has been held that *laches* in not making claim of an equitable estate for the statutory period of limitations, the owner not being under disability, will constitute a bar to equitable relief if there has been no

fraud and the possession has been held under a claim unequivocally adverse.

Lawyer's Rep. Ann., page 191, and cases cited.

But such is not this case. In this instance the suit was instituted more than *four* years before the statutory period of limitations, for the comment of an action of ejectment had expired.

It is respectfully insisted the amended bill presents a case, that the court erred in sustaining the demurrer, and the cause should be reversed, with directions to defendants to answer.

All of which is respectfully submitted.

JOHN H. MITCHELL,
Solicitor for Plaintiff.

Office Supreme Court U. S.
FILED
APR 28 1890
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

October Term 1889.

J. M. SHIVELY, Appellant,

vs.

NANCY WELCH, JOSEPH N. DOLPH, JAMES W. WELCH, and W. W. UPTON, Appellees.

Appeal from the Circuit Court of the United States for the District of Oregon.

MOTION FOR LEAVE TO FILE AFFIDAVITS AS TO VALUE OF PROPERTY IN CONTROVERSY.

Now comes J. M. Shively, appellant, by his solicitor, John H. Mitchell, and moves this Honorable Court for leave to file affidavits, of which the following are copies, as to the value of the property in controversy in this suit.

JOHN H. MITCHELL,
Solicitor for Appellant.

STATE OF OREGON, } ss:
County of Clatsop, }

I, John M. Shively, Edward O'Connor, Thomas Dealey, being first duly sworn, each for himself and not one for the other, doth depose and say: That tide land block one hundred and eleven (111) and the west half of block numbered one hundred and forty-five (145), situate in Shively's first addition to the city of Astoria, Clatsop county, State of Oregon, as laid out and recorded by J. M. Shively in the county clerk's office, in said county of Clatsop; said block one hundred and eleven (111) and the said west half of block one hundred and forty-five being the property involved in a suit now pending in the Supreme Court of the United States, wherein John M. Shively is appellant and Nancy Welch is defendant, was, at the commencement of said suit, viz., May the sixteenth (16th), A. D. 1882, was then, and is now, at the day of the date hereof, worth more than the sum of five thousand dollars ($5,000.)

JOHN M. SHIVELY,
THOMAS DEALEY,
E. O'CONNOR.

Sworn and subscribed to before me this 21st day of April, 1890.

[SEAL.] E. C. HOLDEN,
Notary Public for State of Oregon.

Inasmuch as this cause has been on the docket of this Court over three years, and no motion to dismiss for want of jurisdiction had been submitted upon the ground that the value of the property in controversy was not made sufficiently clear in the record to confer jurisdiction on this Honorable Court, it was not believed that any question of that character would be raised by counsel. Appellant's solicitor, however, was informed within the past ten days, by counsel for the defendants, that he expected to raise the question, which it is conceived he has a perfect right to do, even on the trial, as would the Court itself without suggestion from counsel.

As there is a vagueness in the averment of the amended complaint on the question as to the value of the property in controversy, and as it is believed by counsel that this is one of the class of cases wherein the Court would permit the fact to be made plain by affidavit, it is respectfully submitted the motion to file accompanying affidavits should be allowed.

If the record is uncertain, contradictory, or unsatisfactory as to the question of value, this Court will hear affidavits upon that question.

Parker *v.* Morrill, 106 U. S., p. 2.
Youngstown Bank *v.* Hughes. 106 U. S., p. 524.
Elgin *v.* Marshall, *Id.*, 580.
Williamson *v.* Kincaid, 4 Dall., 20.

Respectfully submitted.

JOHN H. MITCHELL,
Solicitor for Appellant.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 305.

J. M. SHIVELY, *Appellant*,

vs.

NANCY WELCH, J. N. DOLPH, W. W. UPTON, and JAMES W. WELCH, *Appellees*.

Appeal from the Circuit Court of the United States for the District of Oregon.

Brief and Argument for Appellees Nancy Welch, J. N. Dolph, and James W. Welch.

J. N. DOLPH,
in propriâ personâ,
and Attorney for the Appellees,
Nancy Welch and James W. Welch.

WM. H. MOORE, PRINT., 511 ELEVENTH ST. N. W.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 305.

J. M. SHIVELY, *Appellant*,

vs.

NANCY WELCH, J. N. DOLPH, W. W. UPTON, and JAMES W. WELCH, *Appellees*.

Appeal from the Circuit Court of the United States for the District of Oregon.

Brief and Argument for Appellees Nancy Welch, J. N. Dolph, and James W. Welch.

STATEMENT.

This suit is brought by the plaintiff, in the court below, John M. Shively, to have the defendants, Nancy Welch, James W. Welch, Joseph N. Dolph, and W. W. Upton, declared to be the trustees of the plaintiff for certain tide lands conveyed to said Nancy by the commissioners for the sale of school lands, of the State of Oregon, on August 28, 1876, the same being known as block 111, in front of shore block 13, in the town of Astoria, Ore., and the west half of each of the blocks 41, 46, and 145, lying in front of the west half of block 5, in said town, and of the alleged value of more than $5,000.

The issues upon which the case was tried were raised by the demurrer of the defendants to the amended bill.

It is alleged in the amended bill that in March, 1844, the plaintiff, John M. Shively, was a "settler," under the laws of the provisional government, on a tract of public land, on the south bank

and near the mouth of the Columbia River, containing 640.56 acres, and laid off a town thereon containing 121 blocks, divided into lots, and extending from ordinary high-water to the southward, and commonly known as "Shively's Astoria;" and on April 18, 1845, he bargained and sold, by an instrument in writing, to James Welch the undivided one-half of said lands and blocks, except about 20 lots. (See Record, folios 32 and 33, p. 15.)

That prior to March 13, 1850, the plaintiff, with the consent of Welch, laid off additional blocks, numbered from 122 to 150, both inclusive, the same being situate almost wholly in front of said tract of land, and between ordinary high and low water-mark, and on said day said Shively and Welch divided the premises, so far as surveyed into blocks, between them, and by their deeds quitclaimed the same to each other; that upon the passage of the donation act, (September 27, 1850, 9 Stat., 497,) the plaintiff became and was a qualified married "settler" on said land under said act, and had been such settler for more than four years prior thereto, to the knowledge of said Welch, who, nevertheless, now disputed the plaintiff's right to hold said land as a donation under said act, by reason of the premises. (See Record, folios 33 and 34, pp. 15 and 16.)

And for the purpose of settling said dispute, on February 18, 1860, the plaintiff and his wife, Susan L., in pursuance of an arrangement with said Welch to that effect, conveyed by deed, with a general warranty, to the latter and his wife, Nancy, each one-fourth of the unplatted portion of said donation claim and certain of the blocks aforesaid, in number about one-fourth of the whole number surveyed; that the conveyance to said Nancy included the blocks 5 and 13 aforesaid, and was made to her at the request of her husband, and upon the consideration and for the purposes aforesaid, and not otherwise, and thereupon said Welch ceased and withdrew his opposition to the plaintiff's claim to the premises, as a donee under the donation act, and thereafter, on January 24, 1866, a patent was duly issued thereunder, conveying the east half of the donation claim to the plaintiff and the west half to his wife, Susan L.; (see Record, folios 35, 36, and 37, pp. 17 and 18;) that blocks 111 and 145 are wholly below ordinary high tide, and were represented on the map of "Shively's Astoria" as being each 300 feet square, bounded on all sides by streets, and were included in the quitclaim of March 13, 1850, made by Welch to the plaintiff; and said block 111 is immediately in front and north of the shore block 13 in the west half of said donation, from which it is separated on said map by Wall street, while block 145 is immediately in front and north of shore block 5 in the east half of said donation, from which it is separated on the map by Hemlock street; that both Wall and Hemlock streets are now below ordinary high-water mark and block 13 is more

than one-fourth and block 5 near one-sixth below said line, but in 1856, at the date of the official survey of the Shively donation, a small portion of the west end of Wall street was above the meander line, while such line ran diagonally through the whole length of Hemlock street, in front of block 5, so as to leave about three-fourths of the same above said line and about one-fifth of block 13 was below said line. (Record, folios, 40, 41, and 42.)

That on March 7, 1881, the plaintiff and wife conveyed the latter's half of the donation, with certain exceptions not material to this case, to Milton Elliott, and on the day following he conveyed the same to the plaintiff. (See Record, folios 38 and 39, p. 18.)

That on September 3, 1875, Nancy Welch applied to the commissioners of the State for the sale of school lands to purchase the tide lands lying in front of blocks 5 and 13, under the State act of October 28, 1872, "to provide for the sale of tide and overflowed lands on the sea and shore coast," (Ses. L., 129,) and the act of October 29, 1874, (Ses. L., 76,) amendatory thereof, as the owner of said blocks, and represented that said tide land was not held by any person claiming by, through, or under her, or any one through whom she claimed, which representation the bill alleges to have been false, to the knowledge of the party making it, who then knew, as it is alleged, that the plaintiff was the "equitable owner" of the property and entitled to purchase the same from the State, and that about August 28, 1876, she obtained from said commissioners a conveyance of the tide land in front of block 13 and the west half of block 5, including block 111 and the west half of block 145, while the plaintiff, at the date of both said application and conveyance, was an applicant in due form of law for the purchase of said tide lands, and was the only person entitled to purchase the same under said act.

That on October 19, 1876, the defendants, James Welch, Joseph N. Dolph, and W. W. Upton, procured a conveyance from said Nancy Welch of an undivided one-fourth of said tide lands, and it is alleged that the "title" of said Nancy is "fraudulent and void" as against the plaintiff, and that the conveyance to her co-defendants was made without consideration and received by them with full knowledge of the premises.

To this bill the defendants demurred for the following causes:

1. Uncertainty.
2. Laches.
3. That the question of who was entitled to the conveyance from the State was determined by the commissioners, and their decision, in the absence of fraud, cannot be reviewed by the court.
4. That Nancy Welch took the land and blocks conveyed to her by the plaintiff "free from any contracts of her husband

concerning the appurtenances or riparian rights belonging to said land."

5. That there is no equity in the bill.

The court sustained the demurrer and dismissed the bill.

I.

It is alleged that Mrs. Welch obtained her deed from the State August 28, 1876, and conveyed an undivided ¼ each to James W. Welch, J. N. Dolph, and W. W. Upton October 19, 1876. Complainant slept upon his rights, if he had any, for six years. This is such laches as will not be favored in equity.

2 Story Eq. Jur., § 1520 a, and Note B.
Neelys' Appeal, 85 Pa. St., 387.
Evans' Appeal, 31 P. F. Smith, 278.
28 Ohio St., 568.

II.

Nancy Welch and complainant were contestants for this land, that is, the blocks in dispute, before the Board of Commissioners appointed by the legislature to make sale of the State's tide lands. If the disputed blocks are tide lands, the decision of the board in favor of Mrs. Welch was and is, in the absence of fraud or error of law, conclusive as to her right to purchase the same. And no such error of law or fraud is alleged, nor does it appear that the adverse decision of the board against Shively was not based on matters of fact, which they had exclusive right and power to decide.

Warren *vs.* Van Brunt, 19 Wall., 646.
Shepley *vs.* Cowan, 1 Otto, 330, 340; besides many earlier cases.
Johnson *vs.* Towsley, 13 Wall., 73.
Connor *vs.* Wallace, 47 Cal., 461.
Rutlege *vs.* Murphy, 51 Cal., 388.

III.

The general allegation that Mrs. Welch fraudulently and falsely represented to the board that she was entitled to purchase the same as appurtenant to said blocks 5 and 13 is not an allegation that any fraud was practiced upon the board, or that any representation of fact was made which was false, or any concealment made of any fact whatever, and such general allegation is insufficient to induce a court of equity to interfere.

Moore *vs.* Greene, 19 How., 69.
Beaubien *vs.* Beaubien, 23 How., U. S., 190, 208.

IV.

Mrs. Welch had the right to become the purchaser of these lands from the State. Tide lands in Oregon belong to the State by virtue of its sovereignty.

Pollard *vs.* Hagan, 3 How., 210.
Mumford *vs.* Wardwell, 6 Wallace, 435.
Weber *vs.* Harbor Commissioners, 18 Wallace, 65.
County of St. Clair *vs.* Lovingston, 23 Wallace, 68.
Barney *vs.* Keokuk, 4 Otto, 324.
Bissell *vs.* Henshaw, 1 Sawyer, 579.
Hinman *vs.* Warren, 6 Oregon, 411.

In Hinman *vs.* Warren, (6 Oregon, 411,) the court said:

"Tide lands—those that are uncovered and covered by the ebb and flow of the sea—belong to the State of Oregon by virtue of its sovereignty."

"This doctrine is the clear result of the principle announced in all the cases, from Pollard's Lesees *vs.* Hagan, (3 How., 230,) to Barney *vs.* Keokuk, (4 Otto, 323.)

"But it is contended that this sovereignty did not attach until the State was admitted into the Union. This is true, but it is also equally true that the United States Government has no constitutional or statutory authority to so act toward a Territory as to make it impossible to admit such Territory upon an equal footing with the other States of the Union. In all matters which touch the sovereignty the general Government is in the very nature of our system simply a protector thereof until the Territory assumes the ampler power of a State, and becomes, therefore, enabled to assert and protect its sovereignty."

The Legislative Assembly of Oregon, in 1872, passed an act providing for the sale of tide lands, which act was amended in 1874. It was under these acts that the appellee, Nancy Welch, applied to the Board of Commissioners for the sale of school lands of the State of Oregon to purchase the tide lands in front of her blocks, 5 and 13, and was held to be entitled to purchase the same and received a conveyance therefor.

The portions of said act, 1872, as amended in 1874, material to the present inquiry, are as follows:

"SECTION 1. That the owner or owners of any land abutting, or fronting upon, or bounded by, the shore of the Pacific Ocean, or of any bar, harbor, or inlet of the same, or rivers and their bays in which the tide ebbs and flows, within the State, shall have the right to purchase all the tide land belonging to this State in front of the lands so owned.

"SEC. 2. The officers of this State who are now or who hereafter may be authorized to dispose of the school lands belonging to the State," (the Governor, the Treasurer, and the Secretary of State,) "are authorized, empowered, and directed to sell such tide lands upon proper application to purchase, by parties authorized to purchase.

"SEC. 3. Every applicant for the purchase of tide land, under Section 1 of this act, shall, with his application, present to the officer or officers who are or shall be authorized to sell such tide lands the evidence of his title to land which abuts, or fronts upon, or is bounded by, such tide lands, and before making such sale such officer or officers shall be satisfied that such applicant is the owner of such lands so abutting, or fronting, or bounded, as aforesaid.

"SEC. 4. The value of such tide lands shall be appraised at a certain sum per acre of the same, and such appraisal shall not value the lands at less than $1.25 for each acre of such lands: *Provided*, The board having in charge the sale of such lands shall have power to set aside any appraisement, on evidence taken of the true value of the same, and shall make another and true appraisement based on such evidence.

"SEC. 5. If any person or persons who at the passage of the act, of which this is amendatory, were entitled to purchase any tide lands under the provisions of Section 1 thereof shall not have applied for the same within three years from the passage of said act, or having made such application has failed to prosecute the same according to law, then such lands shall be open to purchase by any other person who is a citizen and a resident of the State of Oregon: *Provided*, That when any application shall be made for the purchase of any such tide land by any person or persons other than the owner or owners of the lands adjacent to such tide lands, or the purchaser or purchasers of such lands from such owner of adjacent lands, or some previous owner thereof, notice shall be given by said board to the owner or owners of such adjacent lands, or to any parties who are in possession of or who shall have improved such tide lands in any manner, and such owner or owners of such adjacent lands, or the person in possession of such tide lands by purchase from such owner of such adjacent lands, or any previous owner thereof, or who shall have improved the same, shall have sixty days after the service of such notice to make application for the purchase of such tide lands, and such application shall have preference over all others, and all applications to purchase tide lands by the owner of adjacent lands shall be accompanied by the affidavit setting forth that such land is not held by any other person under a deed from said applicant, or any person under whom he holds."

Section 5 of this act is somewhat vague, but the most favorable construction to appellant of the whole act is, that the shore owner is entitled to purchase the tide land in front of him, unless he or some one under whom he holds the title to the shore has transferred his right to purchase the tide land in front of the shore to another, who, in such a case, is entitled to purchase it from the State.

From the bill it appears that Nancy Welch was the person designated by the law as having the right to purchase.

It clearly appears from the amended bill that appellant's donation claim was bounded on the north by the ordinary high-water line of the Columbia River; that Nancy Welch at the time she applied to purchase the tide lands in question was the owner in fee of blocks five (5) and thirteen (13) in Shively's Astoria, under a deed directly from Shively and wife, who were the donees from the Government; that said blocks 5 and 13 abutted upon the Columbia River, the line of ordinary high-water crossing them, and block 111 was tide land in front of said block 13, and block 145 was tide land in front of block 5. (See Exhibits "A" and "C" to amended bill.)

The west half of blocks 41 and 46 are alleged to lie in front of the west half of block 5; they must, therefore, as will be seen by reference to Exhibit "C" of the bill, lie in deep-water below the line of ordinary low-water. Block 41 was conveyed to Nancy Welch by the deed of February 18, 1860. Nancy Welch was therefore the owner of the shore under a deed directly from the appellant, which conveyed to her the fee without condition or reservation. There was, therefore, no purchaser of such tide lands from Nancy Welch, or any person under whom she held.

V.

An effort is made to extend the writings beyond their import and to cause them to have effect of agreements not contained upon their face. The first of these writings were the deeds of April 18, 1845, referred to as a deed of bargain and sale by Shively to Welch of an undivided half interest in the land of appellant. The second were the two quitclaim deeds of March 13, 1850, by which only then existing possessory rights were or could be conveyed. The third were the two deeds, one to Welch and the other to his wife, Nancy, of February 18, 1860, by which Shively and wife conveyed to Welch 100 acres of the land and certain enumerated blocks, and to Mrs. Welch 100 acres of land and certain enumerated blocks.

According to a well-settled rule all prior agreements became merged in these conveyances, and their import cannot be varied by parol or otherwise extended beyond what is expressed on

their face. Complainant cannot, therefore, be now heard to allege that these deeds were made upon some agreement by which the water front or riparian right or appurtenances was to be limited or restricted in some manner not expressed in the deeds. To allow this would overturn the statutes of frauds and unsettle every conveyance by limiting its effect contrary to its terms. Much less can Shively claim that Mrs. Welch's rights under the deed to her can be thus varied and its effects changed by alleged agreements between Welch and himself. No trust as to the riparian property for Shively's benefit can be thus annexed to these conveyances.

Buel *vs.* Willard, 9 Barb., 641.
Witbeck *vs.* Waine, 16 N. Y., 532, 535.
Howes *vs.* Barker, 3 John., 506.
Williams *vs.* Hathaway, 19 Pick., 287.
1 Sto. Eq. Jur., 158, 161, note.
2 Sto. Eq. Jur., 1531.
Oregon Code, p. 264, Sec. 771.

VI.

On March 13, 1850, when Welch executed his quitclaim deed of partition to Shively he (Welch) could have had no other interest in these disputed blocks than the mere right of possession; even if they had been high land embraced within the donation claim, his quitclaim deed thereto would not have bound or affected an after-acquired title, obtained by himself.

Jette *vs.* Pickard, 4 Or., 296.
Field *vs.* Squires, 1 Deady, 367.
Lamb *vs.* Kamm, 1 Sawyer, 240, 241.

But as the land was tide land belonging to the State, neither party had any rights in or to it which could be the subject of contract between them; much less could Welch, by his contract concerning the same, bind his wife not to apply as owner of the adjacent shore to purchase them from the State. Being a married woman at the time, she could not have bound herself by such a contract.

VII.

The effort here is to raise a trust as to the appurtenances of blocks 5 and 13 for Shively's benefit, upon an agreement alleged to have been made, not with the grantee, but with the party from whom the consideration is alleged to have moved; even if such an agreement had been reduced to writing, and signed by Welch, it would not have bound his wife, the grantee, nor could she be

held to have consented to take the land, with such trust annexed to it, because she accepted a deed in which no such trust or agreement therefor was mentioned.

An express trust of real property or its appurtenances can only be created by the owner thereof.

I know of no implied trust in favor of the party paying the consideration for land, except a resulting trust for his own benefit to the extent of the money paid.

To establish appellant's claim in this suit parol evidence will have to be received that Mrs. Welch agreed to be bound by her husband's alleged agreement with Shively, and such evidence must be received for the purpose and with the effect of varying and controlling the otherwise plain language and terms of the deed from Shively and wife to her. I submit that this cannot be done. Neither could Mrs. Welch have bound herself by any such parol agreement, nor even by a written one thus affecting her real estate, she being at the time a married woman.

Fraley *vs.* Wheeler *et al.*, 4 Oregon, 190.

A proprietor whose land is bounded by a navigable stream is subject to loss by abrasion, and the shore lines vary accordingly.

Washburn on Real Property, Vol. 3, pages, 58, 69.
New Orleans *vs.* U. S., (12 Curtis, 299,) 10 Pet., U. S., 718.
County of St. Clair *vs.* Lovingston, 23 Wall., 68.

VIII.

I do not agree with the conclusion of the learned judge who tried the case in the court below, that the consideration for the conveyance to Mrs. Welch was paid by the husband. Prior to the passage of the act of September 27, 1850, Welch was as much the owner of the claim as Shively. If the conveyance of a half interest of the claim by Shively to Welch had been of one-half the area of the claim in a compact form, no one would have disputed Welch's right to have taken it as a donation claim. And it is difficult to understand why Welch had not as good a right to one-half the claim as Shively to the other half, and as good a right to make claim to the whole as Shively. The surrender of her prospective interest in the claim of her husband, although she might have been powerless to prevent it, should, in equity, be treated as a valuable consideration for the conveyance to her of a portion of the claim by Shively.

It is manifest from the allegations of the bill that James Welch compromised with Shively an adverse claim of right to his land as donation claimant under the act of Congress of September 27, 1850, and surrendered or withdrew his claim in consideration of the conveyance of 200 acres of the land and the blocks to himself

and wife—one-half thereof to each of them. Mrs. Welch, therefore, took her 100 acres of land and blocks conveyed to her in lieu of her half of the land her husband might have obtained under the donation law, if he had insisted upon his claim of right thereto, and she ought to hold the same as if it had been granted to her by the United States as a donation claim.

Field *vs.* Squires, 1 Deady, 377, 378.
Shively *vs.* Parker and Bowlby, 9 Oregon, 500.
Jette *vs.* Pickard, 4 Or., 296.

IX.

It is a maxim of equity that he who seeks equity should do equity. This rule has been applied to a case where a trustee had purchased land in his own name, but for the benefit of the *cestui que trust*, and paid the purchase-money with his own funds, and was also a creditor of the *cestui que trust* for other advances made to or for him, so as to require the beneficiary to pay his entire indebtedness, as well that growing out of the purchase as that arising from other advances before he could compel a conveyance. (Pomeroy's Equity, § 392. See also § 393 and § 400.)

Mrs. Welch was held by the Board of School Land Commissioners to have the right to purchase the tide lands in question. She paid the appraised value to the State, and received her deed. What the appraised value was does not appear. The only statement from which it can be presumed is the allegation that the lands are about the value of five thousand dollars. Appellant seeks to have appellees declared to be trustees, and to hold the legal title to the lands in trust for him, and to convey the same to him, and yet he has never tendered to them the amount of purchase-price paid to the State, and of the taxes and assessments paid on the property; does not offer to pay it, and the complaint contains no allegations from which the court can ascertain the amount, or make any decree concerning the same.

X.

The complainant assumes, in argument, that a part of the land claimed by him as "abutting" land, was above ordinary high tide at the time the tide land was offered and sold by the State. He assumes that the allegations of that part of the bill which treats the boundary line between United States land and the tide land, as a line subject to fluctuate because of erosion and accretion (Transcript, pp. 20 and 19,) avers that at the time of the said application and the sale by the State, a portion of that part of Wall street which lies in front of block 13, was above the line of ordinary high tide; and he makes a like assumption in regard to

a part of Hemlock street. This assumption is not sustained by the language of the bill. The pleader makes no reference to the position of the line at that time, and the bill is silent as to what land was above or below the line of ordinary high tide at the time of that application and purchase. In speaking of blocks 13 and 111, in paragraphs 10, 11, and 12, the pleader makes three distinct statements, but no one of them refers to the condition or location of the line of ordinary high tide at the time of the application or of the purchase from the State. Paragraph 10 speaks of the manner the line was represented on a plat or plan made in 1844 and added to or amended in 1850. (Transcript, pp. 15 and 16.) Paragraph 11 admits that block 111 "lies [at the time of commencing this suit] wholly below ordinary high tide." Paragraph 12 states that when the title to the donation became vested in the complainant and his wife, "a portion of said block number 111 and of Wall street" was above the line of ordinary high tide.

The allegations made in paragraphs 13, 14, 15, and 16, in regard to block 5 and to the tide land in front of it, refer to the same times, and to those only, and are evasive in the same particulars, and nothing is said in the bill of the condition or position of this boundary line or of the abutting lands at the time of applying for and purchasing the tide lands in question.

The bill does not aver ownership of any block, lot, or part of a lot, abutting on the tide land, or that is claimed to have ever abutted on the tide land in question. As to either of the two parcels of tide land, no ownership is claimed in abutting land except the complainant's alleged right or interest in a "portion" of a street after he had conveyed the adjacent blocks as town property by his deed of warranty. The bill admits that these portions of street, the dimensions of which are not specified, do not now abut upon the tide land, and it does not state that they abutted at the time the land was applied for and sold by the State. The bill does not aver of any parcel of land mentioned, whether block, lot, or street, that it was abutting land, or that it was above the line of ordinary high tide, at the only time material, namely, at the time application was made and the land purchased from the State.

What "portion" of that part of Wall street lying between blocks 13 and 111 is referred to, as having once been above ordinary high tide, is not shown, nor is it shown that the complainant applied for or offered to take and pay for a part of block 111, or for the land lying in front of that portion of the street; and the same is the case in regard to the part of Hemlock street mentioned in the bill.

Were the averments what is claimed in the argument, the bill would still be defective in not showing that what is now averred about the changing character of the boundary line was brought

to the knowledge of the Board of Commissioners. To consider allegations of this character for the first time in a bill of this nature would be treating the decision of the board as a nullity. It is not shown that the matter was presented to the board, or known to the defendant, nor is it shown when this alleged state of facts came to the knowledge of the complainant. The State statute empowered and required the Board of Commissioners to determine who were the persons "authorized to purchase," and the decision of an administrative board or officer, made in obedience to a statute conferring authority, will not be set aside or disregarded in the absence of fraud, imposition, or mistake in the discharge of the duty.

Johnson *vs.* Towley, *supra.*
Warren *vs.* Van Brunt, *supra.*
Lynde *vs.* Winnebago County, 16 Wall., 6.

The appellant has not made such a case as entitles him to any relief.

J. N. DOLPH.



No. 1088 Record not print

In the Supreme Court of the United States.

D. C. & H. C. REED & CO.,
Complainants.

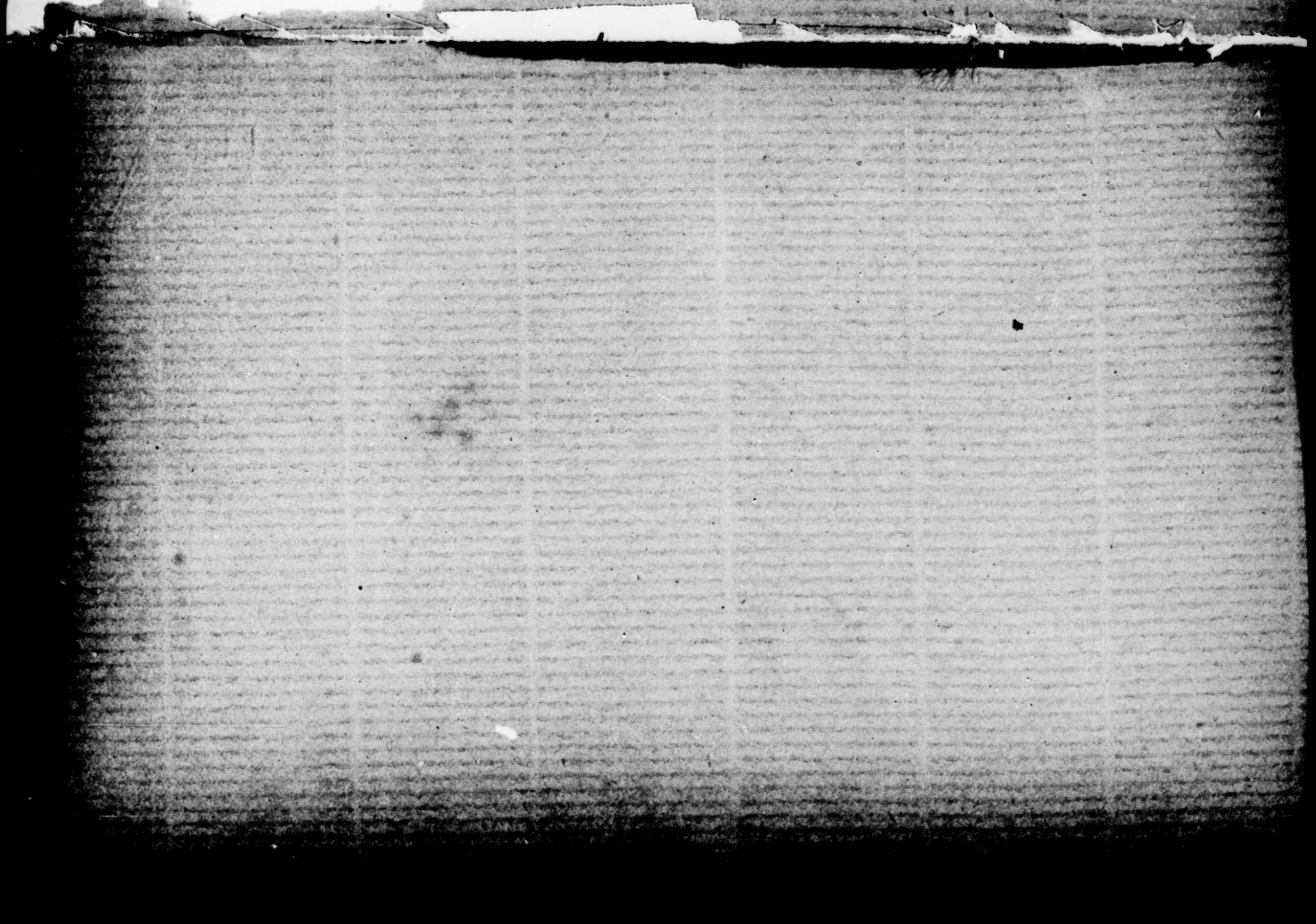
vs.

DANIEL SHORDON,
Appellant.

MOTION TO DISMISS APPEAL.

WM. G. HOWARD, Kalamazoo, Mich.,
COUNSEL FOR COMPLAINANTS.

EDWIN H. RISLEY,
COUNSEL FOR APPELLANTS.



UNITED STATES of AMERICA.

IN THE SUPREME COURT.

Dewitt C. Reed, Heber C. Reed and Adeline Hill, co-partners composing the firm of D. C. & H. C. Reed & Co.,
Complainants,
vs.
Daniel Shordon,
Defendant.

To EDWARD H. RISLEY,
Solicitor for Appellant.

You are hereby given notice that on the 10th day of September, 1889, a motion was duly entered in said cause for an order dismissing the appeal taken therein by the appellant, and that such motion is based upon a petition, affidavit and exhibits, with a true and correct printed copy of which you are herewith served.

You will further take notice that you are herewith served with a true copy of complainant brief of argument on said motion, and such motion will be submitted to said Court on the 14th day of October, 1889, at the opening of said court on that day or as soon thereafter as counsel can be heard.

Dated, September 10th, 1889.

WILLIAM G. HOWARD,
Of Counsel for Complainants.

UNITED STATES of AMERICA,

IN THE SUPREME COURT OF THE UNITED STATES.

DEWITT C. REED, HEBER C. REED and ADELINE HILL, Co-partners comprising the firm of D. C. & H. C. REED & Co., Complainants,

vs.

DANIEL SHORDON, Defendant and Appellant.

To the Honorable, the Judges of the Supreme Court of the United States.

1st. Heber C. Reed, your petitioner, respectfully shows unto the court that he is one of the complainants in said cause, of full age and a resident of Kalamazoo, in the County of Kalamazoo, State of Michigan. That he is the member of complainant's firm who has charge of the commencement and prosecution of said suit in the Court below, and of the negotiations and settlement of the same subsequent to obtaining a decree therein, as hereinafter more fully stated, and because of his personal knowledge of the facts pertaining to the commencement, prosecution and settlement of said cause, makes this petition on behalf of said complainants.

2nd. Your petitioner further shows that said cause was commenced on the 2d day of November, 1887, in the Circuit Court of the United States, for the District of Indiana, in Equity, to recover for the alleged infringement of Letters Patent of the United States, No. 201,946, upon an improvement in Spring Tooth Harrows, and that Messrs. Howard and Roos, of Kalamazoo, aforesaid, appeared therein as complainants solicitors and counsel, and that defendant appeared and answered therein on the 11th day of December next following, by N. H. Stewart, Esq., of Kalamazoo, aforesaid, his solicitor, denying the validity of said Letters Patent. That previous to the commencement of said suit, complainants commenced and prosecuted to final decree a large number of other suits involving the validity of said Letters Patent, in each of which, said Letters Patent was sustained, and in which a large quantity of evidence was taking; and to save time and expense in taking proofs in the above entitled cause the solicitors for the respective parties duly entered into a stipulation, a copy of which is hereto attached, and made part of this petition, and marked "Exhibit One."

3rd. That said cause came on for hearing before the Hon. Walter Q. Gresham, Circuit Judge, at the City of Chicago, on the 22nd day of December, 1888, and the said solicitors for the respective parties had then and there present for the consideration of said Court, all the testimony, documents and exhibits mentioned in said stipulation, and the same were considered by said Court, who thereupon, after hearing full arguments of counsel for the respective parties made and entered a decree in said cause, a copy of which is hereto attached, made part of this petition and marked "Exhibit Two."

4th. Your petitioner further shows that Daniel Shordon, the defendant in said cause was complained of for vending harrows manufactured by one Ira J. Hunt, of Kalamazoo, Michigan, and that as a matter of fact,

said Hunt, being the principal and said Shordon his agent, said Hunt carried on the defense of said suit, and was affected to a much greater extent by said decree than Shordon; that such harrow manufactured by him was an exact duplicate of the harrow manufactured by said complainants, and having then on hand at his factory in Kalamazoo, a large quantity of harrow material which he was desirous of disposing of preparatory to quitting the business and avoiding litigation, he proposed to complainants a settlement and adjustment of all matters pertaining to the infringement of said Letters Patent by him and his agents, which was accepted by complainant and evidenced by a writing duly signed by the parties thereto, a true copy of which is hereto attached, made part of this petition and marked "Exhibit Three."

5th. Your petitioner further shows that in pursuance of said settlement, the complainants paid said Hunt $3,590.63, as follows: $2.590.63 in cash and the balance by deducting the amount agreed to be paid for royalty, which moneys and the whole thereof, said Hunt retains and has never offered to return the same to complainants, or any portion thereof.

6th. Your petitioner further shows that in consideration of such settlement and the purchase by complainants of the material on hand by said Hunt, he then and there entered into and duly signed another writing not to further contest the validity of said Letters Patent either directly or indirectly, a true copy of which is hereto attached, made part of this petition and marked "Exhibit Four;" and thereupon said complainants by writing duly executed by complainants and delivered to said Ira J. Hunt, a copy of which is hereto attached and marked "Exhibit Five," acknowledged full payment of all damages and costs in said suit.

7th. Your petitioner further shows that as a further consideration of said settlement with Hunt, it was agreed that said defendant, Daniel Shordon, should also enter into an agreement with complainants, not to further infringe said Letters Patent, or to further contest the validity thereof in said suit or in any other proceeding, which said Shordon accordingly did on the 28th day of December, 1888; a true copy of which said agreement, which was duly signed by said Shordon and delivered to complainants at the time the same purports to bear date, is hereto attached, made part of this petition and marked "Exhibit Six."

8th. Your petitioner further shows that as a matter of fact, in and by the proceedings, negotiations and adjustment aforesaid, all the matters in said suit were adjusted and settled, and the decree made therein became and is absolute and non-appealable by defendant; but notwithstanding this, your petitioner is informed and verily believes true, that at the instance of a firm manufacturing Spring Tooth Harrows, and doing business at the City of Utica, New York, under the firm name of J. M. Childs & Co., a pretended appeal was taken in said cause on the 12th day of February last, by filing a bond and taking a transcript of the record as it then appeared in the Court below and filing the same in the office of the Clerk of this Court and docketing said appeal as No. 15,008, all of which your petitioner believes will more fully and at large appear by the record of said cause in this Court, and to which, for greater certainty, he prays leave to refer.

9th. Your petitioner further shows that the source of his information in regard to said appeal having been taken at the instance of and in the interest of Childs & Co., who are outside parties and in no way connected with said suit, except to annoy, harrass, and to put the

complainants to expense, is the affidavit of Mr. Stewart, who appeared in said cause as solicitor for said defendant, which said affidavit is hereto attached, made part of this petition and marked "Exhibit Seven."

10th. Your petitioner therefore prays on behalf of said complainants, that said pretended appeal be dismissed for the following reasons:

First. Because the record of said cause filed in this Court is imperfect in that it does not contain the evidence as taken and considered in said cause.

Second. For the reason that prior to said pretended appeal said cause was fully adjusted and settled, and there was nothing to appeal from.

And that complainants may have such further relief, or may have such other relief as to the Court shall seem proper to grant.

HEBER C. REED.

WILLIAM G. HOWARD,
Solicitor and of Counsel for Complainants and Petitioner.

UNITED STATES OF AMERICA,
Western District of Michigan, } ss.

On this 3rd day of September, 1889, before me, a Notary Public in and for the State of Michigan, personally came Heber C. Reed, to me known to be the same person described in and who signed the foregoing petition, and who, being by me duly sworn, did depose and say that he had heard said petition read and knows the contents thereof, and that the same is

true of his own personal knowledge, except as to those matters which are therein stated to be on information and belief, and as to those matters he believes it to be true.

JAMES M. DAVIS,

United States Circuit Court Commissioner for the Western District of the State of Michigan and the Southern Division.

EXHIBIT ONE.

The Circuit Court of the United States.

—FOR THE—

DISTRICT OF INDIANA,

IN EQUITY.

DEWITT C. REED, HEBER C. REED, and ADELINE HILL,
Co-partners in business under the firm name and style of D. C. & H. C. REED & Co.,
Complainants,

vs.

DANIEL SHORDON,
Defendant.

It is hereby stipulated and agreed by and between the respective parties in said cause that the record for final hearing in said cause may be made up from the files and records in this cause now filed therein and all the papers and affidavits prepared for use on either side on motion for preliminary injunction in said cause, and that either side may use upon the final hearing of said cause the printed records of the complainants herein against Ketchun & Barton, Chase, Taylor & Co., Lawrence & Chapin, Hiram Cobb,—and either side shall be allowed to read from such printed records, or the type-written copies of the accountings, or a certified copy of any of the files in said last mentioned cases that either party may deem is material to the issue in said cause.

And it is further stipulated and agreed that the printed copy of the file wrapper and contents of Letters Patent No. 201,946, granted to Dewitt C. Reed, April 2nd, 1878, may be filed or used in the case, and copies of any and all patents that either side may wish to use in said cause, at or before the final hearing, without being certified to, with the same force and effect as though they were certified copies of such patent or patents as they purport to be copies of.

And it is also stipulated and agreed that the following named exhibits may be considered as the exhibits offered by the complainants in said cause, to-wit:

The exhibit Jonesville Tooth and Fastenings; the Hiram Cobb Tooth and Fastening; the H. A. Kiltz & Co. Tooth and Fastening; and the exhibit "Shordon Harrow." And that the following named exhibits may be considered as the exhibits offered by the defendants in said cause, to-wit: Defendant's exhibits Ira J. Hunt's Tooth and Fastening; Lawrence & Chapin's Tooth and Fastening; Chase, Taylor & Co.'s Tooth and Fastening; James H. Albright Tooth and Fastening; Hiram Cobb Tooth and Fastening; J. M. Childs & Co. Tooth and Fastening; Ketchun & Barton Tooth and Fastening; also the printed records on both sides in the cases G. B. Olin & Co. vs. Loomis & Zolles and Chauncey M. Gaylord in the Circuit Court of the United States for the Northern District of New York, In Equity, and the printed records in the cause of said G. B. Olin & Co. vs. Tenney & Ebersole and O. M. Blair, in the Circuit Court of the United States for the Western District of Pennsylvania, In Equity.

Letters Patent No. 41,433, dated February 2nd, 1864, issued to James Hollingsworth.

Letters Patent No. 12,059, dated December 12th, 1854, issued to E. B. Hayer.

Letters Patent No. 65,573, dated June 11th, 1867, issued to James Hollingsworth.

Letters Patent No. 100,100, dated February 22nd, 1870, issued to William S. Archer.

Letters Patent No. 125,216, dated April 2nd, 1872, issued to Linneus A. Paddock.

Dated Dec. 20th, 1888.

HOWARD & ROOS,
Solicitors for Complainants.

N. H. STEWART,
Solicitor for Defendant.

EXHIBIT TWO.

In the Circuit Court of the United States

—FOR THE—

DISTRICT OF INDIANA,

IN EQUITY.

DEWITT C REED, HEBER C. REED, and ADELINE HILL,
Co-partners in business under the firm name and style of D. C. & H. C. REED & Co.,
Complainants.

vs.

DANIEL SHORDON,
Defendant.

At a session of said Court held on the 22d day of December, present the Hon. Walter Q. Gresham, Circuit Judge, this case came on to be argued on the 22d day of December, 1888, upon pleadings and proofs, and after hearing W. G. Howard, in behalf of the complainants, and N. H. Stewart, in behalf of the defendants, it is ordered, adjudged and decreed as follows:

First. That Dewitt C. Reed was the first and original inventor of the improvements in Harrows described and claimed in United States Letters Patent No. 201,946, issued to said Dewitt C. Reed April 2nd, 1878.

Second. That the said Letters Patent No. 201,946 is in all respects good and valid in law, and that the complainants are the owners thereof for the entire United States and Territories except the New England States, New York, New Jersey, Pennsylvania, Maryland, Delaware, Virginia and West Virginia, and are entitled to the exclusive right to use the same in said territory, and sue for and receive all profits and damages arising out of the infringement thereof.

Third. That the defendant has infringed said patent in the vending of harrows as charged in said Bill of Complaint and as shown by the Exhibit in this case of the harrow so sold by the defendant.

Fifth. That the complainants are entitled to a perpetual injunction to restrain the said defendant, his agents, servants, clerks, salesmen, and all persons claiming, holding or operating under him from making, selling, vending and in any manner using and disposing of any harrow, or harrows, or analogous implement, or implements embodied in the invention described and claimed under said Letters Patent, and said injunction is accordingly ordered to issue.

Sixth. The complainants having waived an accounting in this case it is ordered that they do recover from the said defendant the sum of $1.00 damages together with their costs to be taxed, and that they have execution therefor.

Seventh. The complainants hereby agree to submit the case on appeal under Rule 20, if the defendant shall so elect and the defendant praying an appeal in open court, the same is hereby allowed and the bond on appeal is hereby fixed at the sum of $500, with surety or sureties to be approved by the Clerk of the Court.

Signed, W. Q. GRESHAM.

DISTRICT OF INDIANA.

I, Noble C. Butler, Clerk of the Circuit Court of the United States, for the District of Indiana, Do Hereby Certify that the foregoing is a true and full copy of the decree of said Court in the case of DeWitt C. Reed, et al., against Daniel Shordon, made and entered in said case on the 24th day of December, A. D. 1888, as fully as the same remains upon the records now in my office.

Witness my hand and the seal of said Court, this 27th day of December, A. D. 1888.

[seal.] NOBLE C. BUTLER,
Clerk.

DISTRICT OF INDIANA.

I, William A. Woods, Judge of the District Court of the United States, for said District, Do Certify that at the date of the foregoing certificate Noble C. Butler was, and now is, the Clerk of the Circuit Court of the United States, for said District, and that his attestation aforesaid is in due form of law.

Witness my hand, this 27th day of December, 1888.

WILLIAM A. WOODS.

EXHIBIT THREE.

This agreement, made this 27th day of December, 1888, by and between D. C. & H. C. Reed & Co., of Kalamazoo, Michigan, a partnership composed of Dewitt C. Reed, Heber C. Reed and Adeline Hill, parties of the first part, and Ira J. Hunt, of the same place, the party of the second part, Witnesseth, as follows:

Whereas, The said parties of the first part heretofore commenced a suit in the Circuit Court of the

United States for the District of Indiana, in Equity, against one Daniel Shordon for infringing Letters Patent No. 201,946, issued to Dewitt C. Reed, April 2nd, 1878, and such proceedings were had therein, that on the 22nd day of this month the Honorable Walter Q. Gresham, Circuit Judge, did decree that the harrows sold by said defendant, Shordon, were infringements upon said Reed patent. And

WHEREAS, The party of the second part hereto is the manufacturer of the harrows so sold by the defendant, and has had the defense of said suit, and is the person most affected by said decree, and

WHEREAS, Said Hunt is desirous of settling with said Reed & Co. for the damage he has done them by making and selling said infringing harrows, and is desirous of having no further litigation in the premises, and

WHEREAS, Said Reed & Co. are willing to make a settlement with said Hunt on reasonable terms; now, therefore, it is agreed,

1st, That said Hunt shall pay to said Reed & Co. in full for all damages he has caused them by reason of the manufacture and sale of said harrows in the sum of one thousand dollars, and said Hunt agrees to pay the same, which sum is to cover all damages for harrows heretofore made and sold by said Hunt; and no claims are to be made by said Reed & Co. against any of the dealers of said Hunt for harrows bought by said dealers prior to this date. And said Reed & Co. are in nowise to interfere with said Hunt in the collections of any sums or accounts that may be due him for harrows heretofore sold.

2nd. Said Hunt agrees not to further infringe said patent, but is to acquiesce in the decree of Judge Gresham, and does hereby acknowledge the validity of

said patent; and is not in any way to further contest its validity, either in the suit against Shordon or in any other proceedings.

3rd. Said Reed & Co. being manufacturers of harrows of the same kind as those manufactured by Hunt, are to purchase and do hereby purchase from said Hunt 1,025 harrow woods which he now has on hand, which are iron-clad and ready for the teeth, at the sum of three dollars per set of woods for sixteen teeth or over, that being the actual cost of said woods. And five hundred cultivator frames, to be second coated, at eighty cents per frame. Also five hundred sets of castings for said cultivators at two and one-fourth cents per pound, that being the actual cost of said frames and castings. Said sum of one thousand dollars herein agreed to be paid by said Hunt as damages is to be deducted from the price of said harrow woods and material, and the balance to be paid to said Hunt by said Reed & Co.

D. C. & H. C. Reed & Co.
Ira J. Hunt.

EXHIBIT SIX.

In the Circuit Court of the United States

—FOR THE—

DISTRICT OF INDIANA,

IN EQUITY.

DEWITT C REED, HEBER C. REED, and ADELINE HILL,
Co partners in business under the firm name and style of D. C. & H. C. REED & Co.,
Complainants,

vs.

DANIEL SHORDON,
Defendant.

I, Daniel Shordon, the above named defendant, in consideration of the fact that Ira J. Hunt, the manufacturer of the harrows decreed to be an infringement in the above entitled cause, and the person from whom I purchased the harrows sold by me, having settled and paid the above named complainants for all damages sustained by them by reason of the infringing harrows made and sold by him, including the harrows sold to me, and in consideration of the fact that no injunction will issue against me in the said suit if I do not further infringe upon said patent, do hereby agree to acquiesce in the decree of the Court rendered in this cause, and in the validity of said patent; and also agree not to further contest the validity of said patent in this suit, or in any other proceedings, nor to infringe the same.

DANIEL SHORDON.

Dated, December 28th, 1888.

UNITED STATES of AMERICA.

IN THE SUPREME COURT OF THE UNITED STATES.

DEWITT C. REED, HEBER C. REED and ADELINE HILL, Co-partners comprising the firm of D. C. & H. C. REED & Co., Complainants,

vs.

DANIEL SHORDON, Defendant and Appellant.

STATE OF MICHIGAN, } ss.
KALAMAZOO COUNTY. }

N. H. Stewart, of the city and county of Kalamazoo, in the State of Michigan, being duly sworn, deposes and says that he is an Attorney and Counsellor at Law and Solicitor in Chancery.

That he is acquainted with the parties in the above entitled cause, and is familiar with the litigation in said cause from its beginning.

And this deponent further says, that said cause was commenced in the Circuit Court of the United States for the District of Indiana, and that said defendant Daniel Shordon lived and carried on his business in the city of Fort Wayne in said state of Indiana.

And this deponent further says that said defendant in said cause was a dealer in agricultural implements and sold spring tooth harrows, and for injoining the sale of which this suit was commenced and that said harrows were manufactured by one Ira J. Hunt of said City of Kalamazoo.

And this deponent further says, that at or near the time of the commencement of this cause, five other causes were commenced in the same Court by these complainants against five other dealers and sellers of spring tooth harrows manufactured by the said Ira J. Hunt of the City of Kalamazoo.

And this deponent further says, that said Ira. J. Hunt, as the manufacturer of the harrows sold by the respective parties against whom suits were brought and by this defendant, employed this deponent to take charge of said causes including this cause on the part of the defence, he the said Ira J. Hunt becoming responsible wholly and entirely for the expenses incurred in the defence, including deponents services and all outlays of moneys in relation to the same.

And this deponent further says having been engaged on the defense of the questions involved in the suit in other suits brought by these complainants against manufacturers upon a large scale of spring tooth harrows for seven or eight years, had in his possession all the data, records and material necessary to be used on the defence of this cause.

And this deponent further says that without stint or reservation as is shown by the stipulation in this cause as to what should constitute the record therein, said defendant had the benefit of all that had gone before in the litigation upon this question whether as against manufacturer, dealer or any other person.

And this deponent further says that said cause was presented by this deponent to his honor Judge Gresham on the part of the defense in the City of Chicago to the best of his ability, and did all in his power to convince the Court that his position in the defense of said cause was correct.

And this deponent further says that as it is shown by the decree entered in this cause, His Honor Judge Gresham did not quite coincide with this deponent, but gave the complainants a decree conditioned, should the defendant so elect, to go to the Supreme Court under Rule 20.

And this deponent further says that after the entry of said decree, this deponent advised his client, said Ira J. Hunt, to make no settlement or adjustment with the complainants, because he could compel them to go to the Supreme Court under Rule 20 and get a speedy decision of the question by that Court, which would settle all litigation of like character under the Reed patent.

And this deponent further says, disregarding the advice of this deponent, the said Ira J. Hunt, without his knowledge or consent, did settle all the said causes, including this cause, with said complainants, and thereafter called this deponent in to inspect the papers, which this deponent found already prepared when he arrived at the office of D. C. & H. C. Reed & Co., by the attorneys of said complainants, and then and there this deponent for the first time saw and understood what said Ira J. Hunt had done in this cause; that this deponent did inspect the papers that were made and signed between Ira J. Hunt and Dewitt C. Reed, and after some changes and modifications the same were pronounced correct, and in accordance with the agreement and understanding they had heretofore had, were signed in the presence of this deponent by the respective parties, and that Exhibit "3,"

attached to the petition of Heber C. Reed, in the opinion of this deponent is a correct copy of the said agreement and settlement.

And then and there, at the same time, an agreement was drafted, which was signed by the said Ira J. Hunt, and correctly set forth in Exhibit "4," attached to said petition of the said Heber C. Reed. And also this deponent says that then and there a paper was drawn up, which was signed by the said defendant in this cause, Daniel Shordon, settling and adjusting the entire interest in said cause, and that a true copy of said paper is correctly set forth in Exhibit "5," attached to said petition of said Heber C. Reed.

And this deponent further says that then and there it was agreed that this deponent should go to Fort Wayne and present this agreement to the said Daniel Shordon and obtain his signature to the same, which this deponent did, and Daniel Shordon signed the same in the presence of this deponent without word or comment or hesitation after having read a letter from said Ira J. Hunt and understanding that the said Ira J. Hunt had settled not only all the damages as to this defendant, but for the defendants in all causes brought upon said harrow.

And this deponent further says that he had advised said Ira J. Hunt that he had settled his difficulty upon a basis much less favorable to himself than in deponent's judgment he could have gotten had he gone about it in a different way, and then and there this deponent was advised by said Ira J. Hunt that he considered the settlement a good one, and did not want any further difficulty, and would get out of the business; and then and there this deponent's services in said litigation ceased.

And this deponent further says that thereafter and on or about the 23rd day of February, 1889, this

deponent indirectly was advised that said cause had been appealed to the Supreme Court of the United States, and that such appeal was perfected through the instrumentality of J. M. Childs & Co., of Utica, in the State of New York, operating through said Ira J. Hunt.

And this deponent further says that thereafter and on or about the 1st day of March, said deponent was visited by one of the members of the firm of D. C. & H. C. Reed & Co., and his attention was called to the settlement theretofore made between Ira J. Hunt and these complainants, and was then and there requested by said firm, whom this deponent now recollects as being Heber C. Reed, to go to Fort Wayne and consult with Daniel Shordon as to why he took such a course, and also to Indianapolis and see whether or not the said cause had in fact been appealed, and if so, by whom; and also who the attorneys were.

And this deponent further says that on the 4th day of March, this year, he saw the said Daniel Shordon at his place of business in Fort Wayne and asked him if he had taken an appeal, and if so how it came about.

And this deponent further says that then and there said Daniel Shordon advised this deponent that he himself had taken no appeal, but that he had been visited by Ira J. Hunt and one Risley, who claimed to be also in the interest of J. M. Childs & Co., of Utica, New York, and was advised by said Risley that if he would allow them to go forward and use his name in this cause as they might desire, it would be without expense or trouble in any way to him, and they would indemnify him as against any costs whatsoever; and then and there, upon this deponent's asking said Shordon who had signed the appeal bond with him, this deponent was advised by said Shordon that the records of the Court would show.

And this deponent further says that said Shordon then and there advised this deponent that he had advised said Risley and Hunt as he understood it, he had settled and adjusted the case with the complainants and had no further interest in it; and in response to said statement said Risley advised said Shordon that said decision was rendered upon the ground that the case would go to the Supreme Court, and that all they wished of him was to allow them to use his name and the case, and he should in no wise be be jeopardized by it. And thereupon the said Shordon gave his consent to the said Hunt and Risley in accordance with the requests made of him as herein above stated.

And this deponent further says that thereafter, and on or about the 6th day of March, inst., this deponent went to the city of Indianapolis and called on the Clerk of the Circuit Court of the United States for the District of Indiana, and was then and there advised by said Clerk that one Risley, of Utica, New York, had presented himself in his office and requested an appeal of said cause, and then and there filed with said Clerk a bond, of which said bond this deponent procured a certified copy, which is hereto annexed and marked Exhibit "A," and made part of this deponent's affidavit. That said bond appears to be signed by James A. Marley, a resident of Dayton, Ohio, and not by the defendant Shordon. And then and there this deponent asked said Clerk if the transcript of the record had gone forward to Washington, and was then and there advised by said Clerk that it had. Whereupon, this deponent requested to be advised what the transcript contained, and this deponent was then and there shown by said Clerk what had been sent forward.

And this deponent further says that upon an inspection of what he was advised by said Clerk had been

embodied in the transcript, this deponent saw that the most material portion of the record that should be embodied in the transcript and as shown by the stipulation under which the cause was heard before His Honor Judge Gresham, was left out, the same not having been in the possession of the Clerk at the time the pretended appeal was taken.

And this deponent further says that the reason why the data referred to in the stipulation upon which the case was heard, was not filed in Indianapolis, was from the fact that it had to be taken out of other records and carefully prepared and put in shape so as to be filed in said cause, and that this perfecting of the record was a matter agreed to by counsel on either side that might be done at any time. Such agreement and understanding being had and entered into prior to the hearing of said cause on the 22nd day of December, 1888, before Judge Gresham. That after the entry of the decree in said cause, this deponent began to get ready and glean out and prepare to send to said Court the data covered by the stipulation; but before the same was completed, this deponent was advised, as before stated, of the settlement by his client, and thereupon all further work or proceedings in the case were deemed of no importance, and at that point stopped all further labor in the case.

And further deponent says not.

N. H. STEWART.

Subscribed and sworn to before me this 4th day of September, 1889.

JAMES M. DAVIS,
United States Circuit Court Commissioner for the Western District of the State of Michigan and the Southern Division thereof.

EXHIBIT "A" N. H. STEWART.

In the Circuit Court of the United States

—FOR THE—

DISTRICT OF INDIANA.

KNOW ALL MEN BY THESE PRESENTS, That I, James A. Marley, of Dayton, O., by occupation a manufacturer residing at the place aforesaid, am held and firmly bound unto the said Dewitt C. Reed, Heber C. Reed and Adeline Hill, partners doing business at Kalamazoo, Mich., under the firm name and style of D. C. & H. C. Reed & Co., in the sum of five hundred dollars, to be paid to the said D. C. & H. C. Reed & Co., their heirs, executors or administrators, to which payment, well and truly to be made, I bind myself firmly by these presents.

Sealed with my seal and dated this 11th day of February, 1889.

WHEREAS, the above named obligees did procure a decree to be entered in their favor in the above mentioned Court against Daniel Shordon, and he, feeling aggrieved, has procured an appeal to the Supreme Court of the United States to reverse the judgment rendered in said suit by the Circuit Court of the United States for the District of Indiana, before the Hon. W. Q. Gresham, Circuit Judge, on the 22nd day of December, 1888, wherein it is decreed that the defendant did infringe the Letters Patent mentioned in the bill of complaint and

enjoin him from selling or using the said infringement and to pay one dollar damages, with the costs. Now, therefore, the condition of this obligation is such, that if the above named Daniel Shordon shall prosecute his said appeal to effect and answer all damages and costs, if he shall fail to make good his appeal, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JAMES A. MARLEY.

Sealed and delivered in the presence of

EDWARD H. RISLEY.

STATE OF INDIANA, }
Adams County, } ss.

On the 11th day of February, 1889, before me personally appeared James A. Marley, to me known to be the same person described in and who executed the foregoing undertaking of bond, and duly acknowledged the execution thereof.

WITNESS my hand and Notarial Seal this 11th day of February, 1889.

[SEAL.] BEN F. HARPER,
Notary Public.

STATE OF INDIANA, }
Adams County. }

James A. Marley, being duly sworn, says that he is a resident householder, freeholder and resident of Dayton, O., and is worth the sum of one thousand dollars over and above all debts and exclusive of property exempt by law from levy and sale on execution and exclusive of all exemption.

JAMES A. MARLEY.

Subscribed and sworn to before me this 11th day of February, 1889.

[SEAL.] BEN F. HARPER,
Notary Public.

I am personally acquainted with James A. Marley, who subscribed the foregoing affidavit, and know him to be worth the amount named therein in unencumbered real estate situate in the State of Ohio, in his own name, over and above his indebtedness and legal exemptions.

EDWARD H. RISLEY.

February 11th, 1889.

The foregoing bond is approved by me February 12th, 1889.

NOBLE C. BUTLER,
Clerk.

UNITED STATES OF AMERICA, } ss.
District of Indiana, }

I, Noble C. Butler, Clerk of the Circuit Court of the United States for the District of Indiana, Do Hereby Certify that the above and foregoing is a full, true and complete copy of the appeal bond filed in the cause wherein Dewitt C. Reed et al. are complainants, and Daniel Shordon is defendant, in said Court.

Witness my hand and seal of said Court, at Indianapolis, in said District, this 6th day of March, 1889.

[SEAL.] NOBLE C. BUTLER,
Clerk.

Office Supreme Court U. S.
FILED
SEP 26 1888
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

D. C. & H. C. REED & CO.,
Complainants.

vs.

DANIEL SHORDON,
Appellant.

Complainants Brief on Motion to Dismiss Appeal.

W. G. HOWARD, Kalamazoo, Mich.,
COUNSEL FOR COMPLAINANTS.

UNITED STATES of AMERICA.

IN THE SUPREME COURT.

DEWITT C. REED, et al — Complainants,

vs

DANIEL SHORDON, — Appellant.

COMPLAINANTS BRIEF

On Motion to Dismiss Appeal

Concisely stated, the facts in the record embracing this motion show:

1st. That complainants are the owners of Letters Patent of the United States, No. 201,946, covering an improvement in Spring Tooth Harrows.

2nd. That on the 2nd day of November, 1887, complainants commenced a suit in the United States Circuit Court for the District of Indiana, in equity, against the appellant, Daniel Shordon, for infringement of said Letters Patent, in which suit the defendant appeared, answered and on the 22nd day of December, 1888, the

case went to hearing before Judge Gresham, who made a decree in favor of the complainants.

See Exhibit Two, Record, p. 11.

3rd. That the record upon which said cause was heard before Justice Gresham was made up by stipulation, and embraced a large quantity of testimony and documents used in similar cases commenced and prosecuted to final decree by complainants in different courts against other parties.

See Exhibit One, Record, p. 8.

4th. That the infringing implements sold by the defendant, were manufactured by one Ira J. Hunt of Kalamazoo, Mich., who defended said cause for Shordon, and after the rendition of the decree therein by Justice Gresham, to-wit: On the 27th day of December, 1888, five days after said decree was made, entered into a complete settlement with complaints of all matters involved in said suit, as well as all damages sustained by complainants by reason of the manufacture of infringing implements by Hunt. This settlement was in writing, signed by the parties, and specially mentioned the fact that it was a settlement and adjustment of the suit against Shordon.

See Exhibit Three, Record, p. 13.

5th. Under the settlement the complainants took all the harrow material Hunt had on hand, paying him therefor $3,590.93. This amount, less $1,000.00, agreed upon as damages for infringement, Hunt received, and has retained, never returning or offering to return, the same or any part thereof.

See Paragraph 5th, Record, p. 4.

6th. In addition to said contract of settlement, Hunt, in consideration of such settlement, specially agreed in separate and subsequent writing, not to further contest said suit.

See Exhibit Four, Record, p. 16.

7th. Thereupon complainants made and executed to Hunt and Shordon a receipt in full for all damages and costs in said suit.

See Exhibit Five, Record, p. 17.

8th. *On the same day the defendant Shordon, in consideration of the settlement of said suit as evidenced by said writings, and upon the understanding that no injunction should be issued against him, executed and delivered to said complainants a writing agreeing to acquiesce in the validity of said patent, and not to further contest the validity thereof in said suit or in any other proceeding.*

See Exhibit Six, Record, p. 18.

9th. Notwithstanding the settlement of this cause, as evidenced fully by these writings to which the courts attention has been directed, the case reached this court by appeal, claimed to have been taken on the 12th day of February, 1889.

From the affidavit of Mr. Stewart, Record, p. 19, who was defendant's counsel in said cause, employed and paid by Hunt, to defend the same, it would seem that such appeal was not taken in the interest of any party to the record, but in the interest of J. M. Childs & Co., Harrow Manufacturers of Ithica, N. Y. Mr. Stewart's affidavit is important on this motion, as it shows

that the settlement of the suit was fair and fully understood, and that Shordon, the defendant admitted to him that he had nothing to do with taking said appeal.

This is indicated by the fact that, although Shordon is a resident of Indiana, he does not even sign the appeal bond.

See Record, p. 26.

Upon these facts we contend that said appeal should be dismissed.

They show beyond controversey, a full and complete settlement of said cause; not only by the nominal defendant, but by the real party in interest, who has received as a consideration for such settlement $2,590.93 of the complainants' money, which he retains and has never even offered to return.

Not only that, but the defendant Shordon holds complainants' agreement not to issue an injunction against him, and their receipt in full for all damages and costs. Under the circumstances the attempt to appeal this cause is not only a fraud upon complainants, but a fraud upon this Court as well.

J. M. Childs & Co. must have known of the existence of such settlement, and any attempts thereafter to appeal even acquiesced in by Shordan, was evidently only intended to embarass and put complainants to unnecessary expense; and it would be justice on the part of this court to award sufficient costs to complainants to reimburse them for such expense.

As another reason for dismissing said appeal, we submit that the record of said cause is not before the court.

None of the proof submitted by either party is contained in the record, and could not be, as shown by the

stipulation referred to, and by Mr. Stewart's affidavit; and until such record was completed and filed in the court below, said cause was not in a situation to be appealed; as applicable to motions of this character, we respectfully call the Court's attention to the following cases :

Addington vs. Adams, 125 U. S. 853.
E. Tenn. R. R. vs. Southern Tel. Co. 125, U. S. 853.
Vandeventer vs. Green, 111 U. S. 304.

For the reasons specified, we pray that said appeal be dismissed with such costs to complainants as the court may see just to award.

W. G. HOWARD,
Counsel for Complainants.
Kalamazoo, Mich.

Supreme Court of the United States.

10108

DEWITT C. REED, *et al.*,

Appellees,

vs.

DANIEL SHORDEN,

Appellant.

PAPERS OPPOSING MOTION TO DISMISS.

EDWIN H. RISLEY,
Solicitor and of Counsel for Appellees.
UTICA, N. Y.

WM. G. HOWARD,
Solicitor and of Counsel for Appellant.

UTICA, N. Y.
L. C. CHILDS & SON, LAW PRINTERS.
1889.

SUPREME COURT OF THE UNITED STATES.

DEWITT C. REED, *et al*,
Appellees,
vs.
DANIEL SHORDEN,
Appellant.
} *No.* 1,508.

The following is the evidence submitted, together with the unprinted record now on file in this Court, in opposition to the appellees' motion to dismiss the appeal in Case 1,508, on the docket of this Court.

The affidavit of	Ira J. Hunt,	pages	1	to	5
" " "	Daniel Shorden,	"	6	and	7
" " "	Edwin H. Risley,	"	7	to	11
" " "	Ira J. Hunt, Ex. A.	"	11	"	14
" " "	J. Morris Childs,	"	15	"	20

All of which is respectfully submitted.

Oct. 5, 1889.

EDWIN H. RISLEY,

Solicitor ~~of Cause~~ for DANIEL SHORDEN, *appellant*,

Utica, N. Y.

SUPREME COURT OF THE UNITED STATES.

D. C. & H. C. REED & CO., 1

vs.

DANIEL SHORDEN.

STATE OF MICHIGAN, } *ss.*
KALAMAZOO COUNTY, }

Ira J. Hunt, being duly sworn, says he resides in Kalamazoo, in said State, and is the person mentioned in the affidavit of N. H. Stewart, sworn to on the 4th of September, 2 1889, in this action, as appears from printed motion papers which deponent has read.

That deponent made arrangements with Mr. N. H. Stewart, an attorney and solicitor of Kalamazoo, under which he appeared in this action and filed an answer in the case.

That at the time of the arrangement, Mr. Stewart was engaged in defending suits brought by these complainants 3 against Lawrence & Chapin, Chase Taylor & Co., and their customers for alleged infringement of what is known in the harrow trade as the Garver patent, which covered a curved spring tooth, and expired before deponent began manufacturing harrows, and the patent in suit in this action, and each of said firms were making vigorous defences to said patents, and deponent believed that Mr. Stewart could better defend this suit on account of his knowledge of the patent mentioned in the complaint in this action, and hence de- 4 ponent procured Mr. Stewart to defend this suit.

That deponent was not consulted, and he never knew that any such stipulation as "Ex. 1" had been entered into until the latter part of January, 1889, when he was informed of this fact by Edwin H. Risley.

5 Deponent says that about the date of that stipulation, he was informed by telegraphed from N. H. Stewart, that the Shorden case would come on for final hearing at Chicago, before Judge Gresham, on the 22d, and he was so notified on or after the 20th of December, 1888, and his attendance at said Court was requested. Deponent accordingly went to Chicago and was present at the final hearing of the case, as deponent supposed, upon proofs duly taken, and not upon stipulation, and at the termination of the hearing, Judge Gresham gave the plaintiff a decree, upon condition that the
6 case should go the Supreme Court of the United States, under rule 20. That unless complainants would consent to expedite the case, he would grant a decree to the defendant, and expressed a good deal of doubt as to the validty of the patent, and as to whether the defendant infringed the same, by the sale of the harrow manufactured by this deponent. And the complainants consented to expedite the case, and the decree was granted. That on the way from Chicago to Kalamazoo, Moses Hill, the husband of one of the complainants, importuned deponent to sell out his harrow business
7 to these complainants, and he was advised to do so by Mr. Stewart, who said it was the best way out of it. And upon reaching Kalamazoo, and after some further negotiations, deponent did sell out his entire harrow business to the complainants and signed agreement "Ex. 3," beginning at page 13, and ending at page 15, of the motion papers, to dismiss appeal. That it was said before Judge Gresham that the case against Lawrence & Chapin was then on appeal to the Supreme Court, and expediting this case would facilitate a speedy hearing.

8 Deponent says that he never agreed to procure a settlement or release from this defendant. That the complainants did request him to get such a document, and he declined and refused to do so. That he never employed N. H. Stewart to procure the same.

Deponent says that just prior to the 20th of December, 1888, a combination was formed between these plaintiffs, Chase, Taylor & Co., Lawrence & Chapin, G. B. Oiin & Co.,

and A. L. Stevens & Son, all extensively engaged in the manufacture and sale of spring tooth harrows, by which they were to adjust all differences existing between the said firms, on account of the alleged infringement of the patent in suit and the combination to sustain prices and to prosecute and break down the trade of all other manufacturers and dealers in harrows outside of said combination, by suits on the Reed patent, and that Mr. N. H. Stewart negotiated and arranged this combination, and knew of it prior to the 20th day of December, 1888, when he signed the stipulation to bring on this case to a hearing, and he brought on said case before Judge Gresham, as a part of the proceedings by which the combination desired a decree in the case, in order to use the same against other manufacturers, and especially against this deponent, all of which was kept from deponent by said Stewart. That Mr. Sewart has been in the employ and pay of members of the said harrow combine since procuring said papers, and of the combine itself since the day of its formation, about the middle of December, 1888. 9 10

Deponent says that a restitution of the property which deponent sold to these complainants cannot be had, as the property was sold and used in the market, and was used shortly after deponent signed the papers. That deponent asks this honorable Court to hold said case, and to set aside said paper signed by the defendant, and to allow the case to stand and be heard in this Court, to the end that the injustice done, not only to the deponent but to the trade, be averted. 11

Deponent further says that after learning of the harrow combination before referred to, he decided to continue manufacturing and selling spring tooth harrows, and so notified complainants, and is now engaged in that business. 12

IRA J. HUNT.

Subscribed and sworn to before me,
this 4th day of October, 1889.

JAMES M. DAVIS,

[L. S.] *Notary Public,*

in and for Kalamazoo County, Michigan, U. S. A.

13 SUPREME COURT OF THE UNTED STATES.

D. C. & H. C. REED CO.,
vs.
DANIEL SHORDEN.

STATE OF INDIANA, } *ss.*
ALLEN COUNTY, }

Daniel Shorden, being duly sworn, says he is a dealer in
14 agricultural implements, in Fort Wayne, Ind. That in the year 1887, the above suit was commenced in the Circuit Court of the United States for the District of Indiana, against this deponent for an alleged infringement of the patent mentioned in the bill of complaint, which alleged infringement consisted in the selling by this deponent of spring tooth harrows, purchased by deponent from one Ira J. Hunt, of Kalamazoo, Michigan. That Mr. N. H. Stewart, of Kalamazoo, an attorney and solicitor, was employed by and appeared for and in behalf of deponent in the above
15 entitled action, and filed an answer to the bill of complaint. That after the answer was filed, deponent did not know, was not informed and was not consulted with reference to any proceedings in the case until the last days of December, 1888, when Mr. N. H. Stewart came to deponent at Fort Wayne, and asked him to sign a paper in the case which he represented was necessary to be signed, and he stated that he came to see him at the request of Ira J. Hunt, in whose interest he claimed that the paper was drawn. And that the said Ira J. Hunt wished deponent to sign the said paper,
16 and that it was all right. The deponent believed said statements of Mr. Stewart, and did sign some paper. Deponent says that he believed said statements made to him by Mr. Stewart until the early part of February, 1889, when he met Mr. Hunt in Fort Wayne, and was there informed that he (Hunt) never employed Mr. Stewart to come to Fort Wayne and procure deponent's signature to said paper. That he did not see or know of the contents of the paper which deponent was requested to and did sign for said Stewart, and

deponent was then informed by said Hunt that Stewart was in the employ of a combination of harrow manufacturers at 17
the time that he got said signature and he (Hunt) claimed that the paper was secured in their interest, and that his said (Stewart's) conduct in said case was fraud upon him.

Wherefore, deponent asks that the paper signed by deponent at the request of the said N. H. Stewart be vacated, and the appeal herein be allowed to stand and be heard upon its merits.

DANIEL SHORDEN.

Subscribed and sworn to before me this 27th day of September, 1889. 18

JAMES B. HARPER,

[L. S.] *Notary Public.*

SUPREME COURT OF THE UNITED STATES.

D. C. & H. C. REED CO,
v.
DANIEL SHORDEN. 19

STATE OF NEW YORK, COUNTY OF ONEIDA, } *ss.*

Edwin H. Risley, being duly sworn, says: he resides in Utica, N. Y., and is of the age of 46 years, and upwards, and is an attorney and counsellor of this Court, and the solicitor of record for the defendant on this appeal, and has been the attorney for Messrs. J. M. Childs & Co., of Utica, N. Y., in the harrow litigation mentioned in the affidavit of 20
J. Morris Childs.

That on the 20th of November, 1888, deponent met Mr. N. H. Stewart, the solicitor for the defendant in this action in the Court below, at Syracuse, N. Y., and there had an interview with him on the subject of forming a harrow combine, among dealers and manufacturers. And the terms of such combination were there talked over, and afterwards re-

21 ported by deponent to the firm of J. M. Childs & Co., who declined to consider the same.

That on or about the 3d or 4th day of December, 1888, deponent was in Chicago, and on his way east he stopped at Kalamazoo, Mich., and there met Mr. N. H. Stewart, who informed deponent that his clients, Messrs. Lawrence & Chapin, and Chase, Taylor & Co., manufacturers of spring tooth harrows, had effected an agreement with these complainplainants, and that they had arranged to settle and go into the combination with them, and Mr. Stewart then urged deponent
22 to interest Messrs. Childs & Co., in order to get them into the combination with Mr. Stewart's clients and these complainants, and in said interview deponent informed Mr. Stewart that he had no authority to bind Messrs. Childs & Co., and told him that he did not know what they might say about it. Mr. Stewart then offered to go to Buffalo or Utica to meet Messrs. Childs & Co., and talk the matter over, and see if they could not be induced to enter combination, provided deponent could assure Mr. Stewart of the payment of his expenses. Deponent, not having authority
23 to make such arrangement, declined to do so.

One of the inducements which Mr. Stewart held out to deponent to induce Messrs. Childs & Co. to enter said combination, was that something would happen very soon which might be detrimental to their interests, which he (Stewart) was not then at liberty to state to deponent.

Deponent afterward, and on the same day, had an interview with Mr. Herbert C. Reed, one of the complainants, at
24 his place of business, in said city of Kalamazoo. And in said interview, Mr. Reed informed deponent that his firm had arranged the terms of settlement with Lawrence & Chapin, and Chase, Taylor & Co., and that the terms of settlement embraced all of the prior litigations, and would, when completed, present, as between those firms, a clean balance sheet, and that Lawrence & Chapin and Chase, Taylor & Co., were to recognize the validity of the patent in suit and take a license under the same, and Mr. Reed ex-

pressed the hope that Messrs. Childs & Co. might see their way clear to enter the combination. 25

On deponent's return to Utica, which was prior to the 6th day of December, 1888, he informed Messrs. Childs & Co. of the conversation before mentioned, and they declined to consider the proposition.

That early in January, deponent learned of the decree granted in this action by Judge Gresham, and at the request of Messrs. Childs & Co., in January, 1889, deponent went to Kalamazoo, Fort Wayne and Chicago, and at Kalamazoo he met Ira J. Hunt, and there informed him of the 26 settlement by Lawrence & Chapin, and Chase, Taylor & Co., with these complainants, which as he (Hunt) claimed, he had not heard of, up to that time, and which facts made Mr. Hunt very indignant. On that occasion he made, subscribed and swore to an affidavit with reference to what took place before Judge Gresham, and the circumstances which led to his signing the terms of settlement mentioned in the moving papers herein, and deponent appends to this affidavit, all of that portion of the same which is material to this motion, which is hereto attached, and marked Exhibit 27 "A."

Mr. Hunt went with deponent to Fort Wayne, Ind., and there had an interview with this defendant, when the defendant made known to Mr. Hunt the representations which Mr. Stewart had made to him, which induced him to sign the paper set forth in the moving papers.

It was then and there agreed that the defendant should take an appeal to this Court from the decree granted by Judge Gresham, and disregard the terms of settlement be- 28 cause of the circumstances set forth in the motion papers submitted in opposition to this motion.

And thereafter, deponent perfected the appeal to this Court in this case, by giving the required undertaking specified in the decree, and thereupon filed a transcript of the record, duly certified by the Circuit Clerk, with this Court,

and entered his appearance on this appeal, as solicitor for the
29 defendant and appellant.

Deponent says that while in the West, in January, as before stated, he called upon Judge Gresham at his chambers in Chicago, and had an interview with him on the subject of the decree from which this appeal is taken. The Judge then stated to deponent, in substance, that he granted the decree, with great doubts as to whether the defendant was an infringer of the patent in suit, and mainly on account of the fact that himself and Judge Drummonds had held the
30 patent to be valid and infringed in a litigation wherein the Garver patent was involved, and that their attention was not particularly called to this patent in suit, but was more particularly called to the Garver patent, which was also embraced in the said litigation, and that it was stated to him that the other judges had followed the decree of himself and Judge Drummonds, and that he thought and understood that the case in which himself and Drummonds had granted the decree was then on appeal to this Court, and that by expediting this case, it would receive an early hearing, and the
31 complainant being willing to so expedite, it he granted the decree.

Deponent says that these complainants, in the spring of 1889, brought two actions on the patent in suit, one against Smith & Bratt, of Romeo, Mich., who had one harrow manufactured by Bement & Son, of Lansing, Mich., and the other against one Nelson, of Allegan, Mich., who had a single harrow manufactured by the Farmer's Friend Manufacing Company, of Dayton, Ohio, known as the "Banner harrow," and an application for injunction was made in the
32 former case, before Judge Brown, and in the latter case, before Judge Severence, and in both cases Mr. N. H. Stewart appeared as counsel for the complainants, and in each case injunctions were granted, and in both cases the questions involved what form of clip was required under the patent in suit. And the decision in both cases turned largely on the decree granted in this case. Deponent

was present when the injunctions were granted, and heard 33
the arguments and decisions.

EDWIN H. RISLEY.

Subscribed and sworn to before me,
this 5th day of October, 1889.

MILTON E. ROBINSON,
[L. S.] *Notary Public,*
Oneida Co., N. Y.

Ex. "A." 34

STATE OF MICHIGAN,
CITY OF KALAMAZOO, KALAMAZOO COUNTY, } ss.

Ira J. Hunt, being duly sworn, says he is 40 years of age and upwards, and is a manufacturer of spring tooth harrows, and vender of agricultural implements, and lives in the city and county above named. (Portions omitted not relevant to this motion.) In December, 1887, or thereabouts, suits were commenced by Reed & Co. against Daniel Shorden, of Fort Wayne, Ind., A. B. Miller, of North Manchester, Ind., George A. Knight, of Greenfield, Ind., Brannigan & Tucker, 35
Franklin, Ind., and Barney Trever, of Decatur, Ind., each of whom have purchased harrows from deponent, for an alleged infringement of the Reed patent, (being the patent in suit.) I employed N. H. Stewart, of this city, to defend said cases, and he put in an answer in each case for me, and I paid him for his services $1,461. He never took evidence in the cases, except what was taken as before stated, and without taking my evidence in the case and unbeknown to me, he agreed with Mr. Howard, the attorney for Reed & Co., to 36
bring the case to final hearing before Judge Gresham, of Chicago, and caused me to be notified by telegram at Allegan, Mich., to come home at once. This was on the 18th of December, 1888. I reached here on the 19th, and went directly to his office, and then Mr. Stewart said to me that Mr. Howard and himself had been to Chicago, and arranged with Judge Gresham to hear the case of Daniel Shorden on Saturday of that week, the 22d of December, 1888. I said, "How is this: you are taking this away from Judge

37 Woods, of Indianapolis." He said the Judge was only a District Judge, and it would be better to go before Judge Gresham. He said as there was new evidence, it would be better, for he would be more likely to change his mind than the District Judge would be to not follow Judge Gresham's decision. I said, "if you think best, we will have to let it go that way." I went with Mr. Stewart to Chicago, and was present in Court when the case came up to be heard; the case was called, and Mr. Howard opened the case; there
38 was no evidence of any kind taken in the case by the complainants; Mr. Stewart had printed copies of the affidavits taken to be used in New York, and Mr. Howard had affidavits of D. C. & H. C. Reed, controverting the facts set forth in the affidavits referred to. Exhibits of harrows were produced and shown to the Court, and Mr. Stewart told the court that he had affidavits of new evidence, but did not offer them to the Court, and so far as I know, they were never presented to or examined by the Judge, nor was the affidavits of D. C. & H. C. Reed offered in evidence. I was
39 told before I went to Chicago, by Mr. Stewart, that he had agreed with Mr. Howard that the exhibits be read in evidence, and it would not be necessary for me to get new evidence showing that D. C. Reed was not the inventor of the device set out in the patent in suit, and I relied upon Stewart and believed that he had the matter arranged to protect my interests. But he did not submit the proof at all, to the Judge. Something was said about the file wrapper and contents of the Reed patent, and Judge Gresham asked to see it, and read the matter over. The Judge said, "I am satified there is new evidence in the case, that I have never seen
40 before. I think there is not very much in the patent, but through comity to the Judges who have followed me in former decisions, it would not put me in good shape to change and go back on all the other Judges who have followed me. If the complainant in this case will agree to go to the Supreme Court under rule 20, I will grant them a decree. If I dismiss the bill, then there will be a decision both ways by myself." The Judge granted a decree, specified that the former decision made on the Garver and Reed

patents was going to the Supreme Court, and that this case 41
would take the same course and give the decree in conformity with the prior holding on the Garver and Reed patent, when combined in the same bill of complaint. Mr. Stewart then said, "This man is a small dealer, and may have some goods on hand." The Judge then said that he would allow him to dispose of what he had on hand, without cost. Mr. Stewart then said, "Mr. Hunt has goods on hand." The Judge said, "You are not a party, and when they sue you, you come to me." I said I was willing to 42
sell my goods to the complainants, but I wanted to dispose of my goods on hand. Mr. H. C. Reed then came to me, and said, "Don't you be troubled; you come to me when you get home and we will fix that up." Before going to Chicago, I purchased a section of harrow of J. M. Childs & Co., of Utica, N. Y., and took it to Court to show that Judge Wallace had held that this harrow was not an infringement of the Reed patent, and Mr. Stewart showed the exhibit, and said that Judge Wallace had so decided. Mr. Howard claimed that this was not so. That the case had been withdrawn, and they still claimed that it was an infringement. On the 43
24th of December, 1888, I went to Reed & Co.'s office to see what could be done. They offered to take my harrows at $3 per harrow. They wanted to charge me $1.80 per harrow for all I had built. I refused to settle on their terms. After considerable negotiations, we finally agreed to settle on the terms set forth in an agreement, (a copy of which I gave to Mr. Tarbell, being the one set forth in the moving papers.) I then asked him what he was going to do with the Farmer's Friend people, Bement & Son, and others. Mr. Hill and H. C. Reed both said that they were getting 44
evidence as fast as they could, and showed me some, and said they were going to sue their customers as fast as they could get the evidence; they said that they claimed that all the spring tooth harrows now made, infringed the Reed patent, and they were going to sue every one who bought or used a harrow having a tooth adjustable on the frame. I asked them, "Suppose I build the Garver harrow?" He (Reed) said, "You have a right to build the old Garver

45 spring tooth harrow. If you do, we will advertise that we will sell the harrow for $6 or $7, a price at which you nor no other man could sell them." I said, "Is that the kind of religion you have?" "If so, I have have never seen such before." He said, "We intend to protect ourselves, and to do all we can to do so." He then told me that Lawrence & Chapin, Chase, Taylor & Co. and their firm had made an arrangement that they would advertise and sell the same harrow, and would sell it so cheap that no one else could manufacture and sell it.

46 I am informed, and verily believe, that as early as the 19th of November last, the said three firms before mentioned had made arrangements to combine, and that as a part of the agreement of said combination, that it was agreed that all differences on patents should be settled, and they pay to Reed & Co. one dollar per harrow and agree upon prices, and as a part of said combine, that decrees be obtained establishing the validity of the said Reed patent, and that Mr. Stewart was instrumental in negotiating said combination, and that as a part of said combination the arrangement was

47 secretly made to get a hearing on my harrow, with a view to kill my trade and ruin my business, and that procuring of the injunction and decree was a part of the swindling combination entered into and carried on without my knowledge; that my counsel was then in possession of all the information; that he did not disclose it to me, but charged me $458, in getting my harrow enjoined, or decreed to be an infringement, and with full knowledge of the combination, he appeared in a case for W. C. Lull & Co., as late as January 7, 1889, and they also are enjoined from manufac-

48 turing and selling harrows like mine, and Mr. Stewart engineered their case, without disclosing the combination to them or to me.

IRA J. HUNT.

Subscribed and sworn to before me, this 25th day of January, 1889.

SAMUEL W. OXFORD,

[L. S.] *Notary Public*,
in and for Kalamazoo, Kalamazoo Co., Mich.

SUPREME COURT OF THE UNITED STATES.

D. C. & H. C. REED & CO.,
vs.
DANIEL SHORDEN.

STATE OF NEW YORK, } *ss.*
COUNTY OF ONEIDA, }

J. Morris Childs, being duly sworn, says that he has been engaged in the manufacture and sale of spring tooth harrows for upwards of eight years last past, and until the fall of 1886 he dealt in a harrow covered by what is known as the Garver patent, covering a curved tooth, which patent expired on the 5th of October, 1886. That while said patent was in force, the same was owned by the firm of G. B. Olin & Co., of Canandaigua, N. Y., in the eastern territory of the United States, and by these complainants in the western territory, and that the said firms brought, in the various Circuit Courts of the United States, upwards of 350 suits for alleged infringements, and in addition to the suits brought, the said firms collected tens of thousands of dollars from farmers and users of spring tooth harrows, principally manufactured by Lawrence & Chapin and Chase Taylor & Co., of Kalamazoo, and nearly all of said suits were brought, and collections made against dealers and users of their harrows. The main controversy in all of said actions, was over the Garver patent, covering the curved tooth, and in some of the decrees which were entered, they embraced provisions adjudging the patent in suit valid. The suits were brought on the Garver and Reed patents, the latter being the one in suit. That in some three or four cases a decision was entered, substantially by default, adjudging the patent in suit valid, because no attention was paid to the same. And that after the Garver patent was sustained, the subject of the validity of the patent in suit became then a serious question of controversy, and in every case where the cases were brought to a hearing, and opposition made to the patent in suit, the complainants consented

to a dismissal of the bill of complaint, rather than to go to
53 a hearing on the same. In the spring of 1887, deponent's firm began the extensive manufacture and sale of spring tooth harrows. That on the 19th of November, 1888, dedeponent's firm was approached by N. H. Stewart, of Kalamazoo, the solicitor of record for the defendant in this action, with a request that deponent's firm would enter a harrow combination which was then being formed by these complainants, G. B. Olin & Co., Laurence & Chapin, and Chase, Taylor & Co., and in said interview Mr. Stewart stated to deponent that Lawrence & Chapin and Chase, Taylor & Co.,
54 had borne the brunt of the litigation of the Garver patent until they had got tired, and that they had decided to settle up their differences with these complainants, and it was desirable that deponent's firm should enter said combination in order to give it sufficient strength to hold the trade against all other dealers. Deponent declined to enter said combination.

Deponent further says that he learned of the harrow combination about the first of January, 1889. That soon after the decree in this action was granted, extracts from the same
55 were printed and circulated to the trade all over the country by thousands, warning purchasers and dealers against buying any other spring tooth harrow, as Judge Gresham had held the Reed patent valid, and claimed all other harrows were an infringement upon the same.

These advertisements worked irreparable injury to deponent's firm in that orders theretofore taken for sales of their harrows, were cancelled in large numbers, and purchasers refused to buy their harrows, upon the ground that
56 they would be precipitated into litigations on account thereof, and subsequently and during the spring of 1889, these complainants began suits against customers of Bement & Son, of Lansing, Mich., manufacturers and dealers of spring tooth harrows, and against customers of the Farmer's Friend Manufacturing Company at Dayton, Ohio, and in both cases these complainants applied for and obtained injunctions, from the Circuit Courts, against parties who had a single

harrow of each manufacturer, and each of said decisions by 57
the Circuit Court were based upon and controlled mainly by
the decision in this case, as the judges sitting in these cases
felt themselves bound by the decree in this particular action,
although they expressed very great doubts as to the correct-
ness of the decision, and the owners of the patent in suit in
the eastern territory, prepared during last season, to bring
one hundred suits against deponent's customers, not with a
view of having the question decided, but with a view of
preventing deponent from marketing his harrow, and break-
ing down and ruining the trade of all persons other than 58
those in the combine and they are now engaged in the effort
to do so. That on the 9th of January, 1889, shortly after
Judge Gresham's decree had been entered, in this action,
deponent was approached by the representative of A. L.
Stevens & Son, a member of said harrow combination, to
enter the same, and was invited to meet these complainants
at Kalamazoo, and did meet them there in the month of
January last, and he was there again informed that a harrow
combination had been made between these complainants, G.B.
Olin & Co., Lawrence & Chapin, Chase, Taylor & Co., and 59
A. L. Stevens & Son, each of said firms being extensively
engaged in the manufacture and sale of spring tooth harrows,
and deponent's firm being the largest firm outside of the
combination. Deponent says he was informed that all pend-
ing cases and appeals had been settled between members of
the combine, and deponent was asked to go into the com-
bine on the terms that he should recognize the validity of
the patent in suit, take a license under the same, and pay
one dollar for each harrow sold, and that out of this fund,
the owners of the Reed patent would bring suits, with a 60
view of annoying and breaking down the trade of dealers
outside of the combination, and deponent refused to become
a member of said combination, and has since continued the
manufacture and sale of spring tooth harrows.

That the continued publication and use of the decree in
this action, and the applications for injunctions against other
manufacturers and dealers not in the combination, based upon
the decree in this action, is working an injury to the trade out-

61 side of the combination, and for the reasons set forth in this affidavit and in the affidavit of Ira J. Hunt, Daniel Shorden and Edwin H. Risley, deponent asked this honorable Court that the agreements signed by the defendant and Ira J. Hunt, to the effect that they would acquiesce in the decree, be set aside, and that this case be heard upon its merits. The record in this case presents the only question that is raised in any of the cases with reference to the second claim of the Reed patent, to wit., whether a flat band iron used as a clip on the harrows, was such a clip as the patent
62 in suit required, or whether it is the mechanical equivalent of such clip, and this being fairly presented in the record, it is respectfully submitted that question should be adjudged by this Court, to the end that if this Court hold that the harrow in suit was an infringment, that deponent's firm may immediately cease the manufacture and sale, and avoid further litigation and expense, and if it be adjudged that the said patent is invalid or that said harrow is not an infringement, then the annoyance, vexation, costs and expenses incident to numerous litigations be stopped,
63 and the rights of the parties as adjudged by this Court, be respected and enforced.

The harrows manufactured and sold by deponent's firm are claimed by these complainants to be an infringement upon the patent in suit, within the decision of Judge Gresham in this case, and injunctions, based upon the decree appealed from, have been granted by Judges Brown and Severence of Michigan, each of whom, as deponent is informed and verily believes, based his decision upon the decree in this case, and the owners of the patent in suit for more than six months
64 past have been ready to bring and intended to bring and prosecute numerous suits against the customers of deponent in the different Circuit Courts of the United States, throughout the New England and Middle States, where deponent's firm is now marketing their harrows, and would have done so, but that deponent's firm obtained an injunction restraining the bringing of suits against deponent's customers, which injunction order was vacated about ten days since, and deponent verily believes that suits will be brought against his

customers and applications made for injunctions wherein the decision of Judge Gresham in this case, if followed by the Circuit and District Judges, are likely to result in injunctions and work irreparable injury to deponent's trade, although it is ultimately established that the harrow manufactured by deponent's firm is not an infringement, and that inasmuch as the decree in this case and the record presents all of the questions which can be alleged against the patent in suit, deponent asks that he be allowed to intervene and prosecute this appeal upon the ground that a real controversy exists. 65

That all cases brought by the owners of the patent in suit pending between them and the firms of Lawrence & Chapin and Chase, Taylor & Co., and their customers, were settled. That before said settlement the Garver patent was sustained by Judge Mathews, and a *pro forma* decree entered by the same Judge sustaining the validity of this patent, but giving no opinion. That after said decision the firms of Lawrence & Chapin and Chase, Taylor & Co., by their attorney, N. H. Stewart, then made a stubborn defence against this patent in some 12 or 15 cases and procured a dismissal of the bills of complaint, and in every case which was passed for final hearing by defendants the cases on this patent were abandoned by complainants. But after said settlement the owners of the patent in suit, fortified by this decree, have begun suits and secured injunctions against three dealers, each having one harrow, and are using said decrees to intimidate the trade and they will not allow any case to go to final hearing, but intend to use said patent to embarrass others in the trade, to prevent sales, and that with this in view they secretly settled with their cheif antagonists and procured this decree by imposing upon the Court and the parties and that they intentionally brought the harrow manufactured by deponent's firm into this case as an exhibit in order to prejudice deponent's trade, which is being injured daily by their acts and conduct, and that a controversy exists which ought to be disposed of by this Court, as it seriously affects deponent's interest, and because his harrow is involved he asks that he be allowed to intervene and prosecute 66 67 68

69 this appeal, and that the agreement of Hunt and Shorden be set aside or disregarded.

Deponent says he has dealt extensively in harrow material similar to that mentioned in clause 3 of "Exhibit 3," of the motion papers, and is acquainted with the value of such material, and the prices therein mentioned are much below their actual cost and value.

J. MORRIS CHILDS.

Subscribed and sworn to before me this 10th day of October, 1889.

70 CHAS. A. LONG,
[L. S.] *Notary Public*,
Oneida Co., N. Y.

OCT 14 1889

Supreme Court of the United States.

No. ~~1503.~~ 1098.

DEWITT C. REED, *et al.*,

Appellees,

vs.

DANIEL SHORDEN,

Appellant.

APPELLANT'S POINTS.

EDWIN H. RISLEY,

Solicitor and of Counsel for Appellants,

UTICA, N. Y.

UTICA, N. Y.
L. C. CHILDS & SON, LAW PRINTERS.
1889.

U. S. SUPREME COURT.

SUPREME COURT OF THE UNITED STATES.

DEWITT C. REED *et al.*, *Appellees*, v. DANIEL SHORDEN, *Appellant.*	No. 1,508.

FACTS.

The Record in this Case has not been printed; it is on file in this Court and the case docketed. The appearance of appellant's solicitor entered.

The motion to dismiss, is based on two grounds; first, that the unprinted record is incomplete; and second, that since the entry of the decree appealed from, the parties have made an agreement to acquiesce in the decree, and not to litigate the same farther.

FIRST GROUND OF THE MOTION.

It is not pretended in the motion papers, but that the return which is on file in this Court contains all that is essential to enable this Court to properly dispose of the appeal.

The unprinted record, certified to by the clerk of the Circuit Court, is to the effect that the record returned, and now on file in this Court, contains all that was used in the Court below.

When the case is taken up to be finally disposed of, and the record printed, if this Court then finds that it has not before it sufficient facts to intelligently pass upon the question presented, then it will be time enough for the Court to require an amended or further return, and will then make such an order as will protect the rights of the parties.

This Court will not dismiss an appeal regularly taken to this Court, because of a defective record, at least without giving the parties an opportunity to supply such defects.

SECOND GROUND OF THE MOTION.

The application to dismiss shows that Ira J. Hunt, of Kalamazoo, Mich., manufactured and sold to the defendant, the harrow which was decreed to be an infringement upon the patent in suit. The defendant being a local dealer at Fort Wayne, Ind., Mr. Hunt, the manufacturer, employed and paid Mr. N. H. Stewart, the Solicitor of Record in the Court below for the defendant. (*See motion papers, pages 3 and 4.*)

The appellees claim to have settled the controversy with Mr. Hunt and the defendant, after the decree was entered by securing their signatures to agreements (*Ex. 3, 4 and 6*), by which they agreed to acquiesce in the decision appealed from, and not to further contest the same.

The appellant insists that said alleged agreements and the signatures thereto, were procured by the fraudulent collusion of these complainants, with Mr. N. H. Sewart, the solicitor of the defendant and Hunt in the Court below. (*See affidavits of Hunt, Shorden, Risley and Childs.*)

The decree is final and in proper form, and was granted by the Circuit Judge with the intention, on his part, that a speedy hearing on this appeal should be had, and, by the 6th clause contained in the decree, the appeal was allowed by the Court, the amount of the bond fixed, and the option given to this appellant to expedite the case under rule 20 of this Court, if he should elect to do so. (*See 6th clause of the decree in the unprinted record.*)

The defendant promptly took an appeal from the decree to this Court, by filing, at the same term, the bond required, which was approved, and will be found in the unprinted record.

The alleged settlement purports to be signed by Mr. Hunt (*Ex. 3*), embraces three distinct subject-matters: first, a settlement of all damages for the alleged infringement of the patent in suit; second, an agreement to acquiesce in the decree and not to further prosecute the same in the suit against Shorden, or in any other proceeding; and third, the terms of sale of harrows from Hunt to the complainants.

It will not be claimed that the settlement of the damages for the alleged infringement in any manner affects the appeal, or that such settlements would be a reason for dismissing the same.

The real ground, then, for dismissing the appeal, is the agreement on the part of Mr. Hunt and Mr. Shorden to acquiesce in the decree, and not to further contest the same.

If such an agreement was fairly made, then it is valid and no controversy exists in this Court, and the appeal should be dismissed. But if the agreements were procured upon fraudulent representations and concealments, and are the result of an intentional fraud on the part of these complainants, then the appeal ought not to be dismissed, but the case heard upon the merits.

Mr. N. H. Stewart, the solicitor for the defendant in the Court below, says: "This deponent further says, that said Ira J. Hunt, as the manufacturer of the harrows sold by the respective parties against whom suits were brought and by this defendant, employed this deponent to take charge of said causes, including this case, on the part of the defendant, he, the said Ira J. Hunt becoming responsible wholly and entirely for the expense incurred in the defence, including deponent's services and all outlays of money in relation to the same. And this deponent further says, having been engaged in the defence of the questions involved in the suit in other suits brought by these complainants, against manufacturers on a large scale, of spring tooth harrows seven or eight years, had in his possession all the data, records and material necessary to be used on the defence of this cause."

Mr. Hunt says, in his affidavit, that Messrs. Lawrence & Chapin, and Chase, Taylor & Co., prior to the commencement of this action, had been engaged

in numerous litigations with these complainants, over what was known in the trade as the Garver spring tooth harrow, the patent covering the curved tooth, and expired on the 6th of October, 1888, and Mr. Stewart was known to have conducted these defences and was engaged in conducting them, and that was the reason why he was employed by Mr. Hunt to defend this case and others on account of harrows manufactured by himself.

The affidavit of J. M. Childs shows, that the owners of the patent in suit had brought upwards of 350 cases in the different Circuits, on the Garver patent and the patent in suit, and that two or three decrees had been entered in those cases in which the Court had found the patent in suit to be valid and infringed. That after the validity of the Garver patent was sustained, then the patent in suit was more sharply contested, and in every case where they were passed the suits were withdrawn or the bills of complaint dismissed on the complainant's motion, and all of these litigations were going on between the plaintiffs, Lawrence & Chapin, Chase, Taylor & Co., and their customers, when this suit was brought, together with five others, and Mr. Hunt, knowing these facts, employed Mr. N. H. Stewart to defend the actions, including this one, and he put in an answer and the case was at issue, by filing a reply. (*See affidavits of Hunt and Childs.*)

On the 19th of November, 1888, Mr. N. H. Stewart was in Utica, N. Y., and then informed Mr. Childs that Messrs. Lawrence & Chapin and Chase, Taylor & Co. were going to settle up their litigations and go into a harrow combination, and

solicited Mr. Childs to enter the combination with them. This was refused. (*See Childs' affidavit.*)

On the 20th of November, 1888, the suit brought by the owners of the patent in suit against J. M. Childs & Co. was dismissed at Syracuse. On that day Mr. Stewart then attempted to interest Mr. Childs in the combination. This was refused. (*See Risley's affidavit.*)

On the 6th of December, 1888, at Kalamazoo, Mich., Mr. Stewart informed Mr. Risley that Messrs. Lawrence & Chapin and Chase, Taylor & Co. and these complainants, had settled their differences and had arranged a combination and that something would happen detrimental to Messrs. Childs & Co., and offered to go to Utica or Buffalo to talk over the combination, providing his fees were guaranteed. This offer was declined. (*See Risley's affidavit.*)

On the same day, (Dec. 6, 1888), Mr. Reed, one of the complanants, informed Mr. Risley that they had effected arrangements for settling the litigations with Lawrence & Chapin and Chase, Taylor & Co. so as to present a clean balance sheet and that the items of the combination had been substantially agreed upon. (*See Risley's affidavit.*)

On the 19th of December, 1888, without consulting either Mr. Hunt or this defendant, or apprising them of the settlements and combination, Mr. Stewart and the complainant's solicitor signed a stipulation to remove the papers from the clerk's office in Indianapolis and take them to Chicago, by special messenger. (*See stipulation in the unprinted record.*)

The stipulation for final hearing allowed the complainants and the defendant to use *ex parte* affidavits prepared on a motion for preliminary injunction. (*See papers in the unprinted record.*)

This stipulation was not filed with the clerk in the Court below until the 7th of January, 1889, more than fourteen days after the decree from which this appeal was taken, was filed. (*See date of filing in the unprinted record.*)

The final hearing was had before Judge Gresham on the 22d of December, 1888, and after hearing counsel the Court said that he had very great doubts whether the defendant's harrow was an infringement, but inasmuch as he had held the patent valid in a prior case, which it was represented other judges had followed, he would grant the decree, provided the complainants would consent to expedite the case under rule 20 of this Court, and if they would not consent to this he would dismiss the bill, and thereupon they consented, and their consent was entered in the decree. It was stated before Judge Gresham that the case in which he had originally held the patent valid was then on appeal to the Supreme Court and the purpose of expediting this case, was to have the two cases brought on together. (*See Hunt's affidavit.*)

Neither Judge Gresham nor Mr. Hunt had any reason to suppose that all of the cases existing between these complainants and Lawrence & Chapin and Chase, Taylor & Co. on the patent in suit, had been settled prior to that date. The information with reference to the settlement of the suits and the combination was kept from them and this decree ob-

tained under circumstances which were not only a fraud on the Court but on the defendant and Mr. Hunt. (*See affidavits of Hunt, Risley and Childs.*)

After the entry of the decree, the defendant then made an effort to secure a settlement with Mr. Hunt and the circumstances of that settlement are set forth in Ex "A." (*See opposing papers.*)

After learning of the fraud that had been practiced on him Mr. Hunt repudiated the settlement and commenced manufacturing and is now engaged in the business of manufacturing and selling harrows. (*See Hunt's affidavits.*)

The complainants were desirious to secure defendant's signature to the agreement acquiescing in Judge Gresham's decree, and agreeing not to further prosecute the case, and wanted Mr. Hunt to get his consent. This Mr. Hunt refused to do. (*See Hunt's affidavit.*)

Mr. Stewart, unbeknown to Mr. Hunt, and upon the employment of the complainants, went to Fort Wayne and secured Mr. Shorden's signature to the paper, representing that Mr. Hunt had sent him and that it was all right, etc. (*See Shorden's affidavit.*)

Mr. Hunt never authorized Mr. Stewart to make any such representation or to get Shorden's signature. (*See Hunt's affidavit.*)

The circumstances under which the case was brought up from Indianapolis to Chicago, on a secret stipulation, unbeknown to Mr. Hunt, and heard on two days' notice on *ex parte* affidavits,

and upon representations that the decree in which Judge Gresham had first held the patent in suit valid, was on appeal, and permitting the Judge to render a decree in the belief that that case was on appeal, when in fact it had been settled, all of which was kept from the Court and Mr. Hunt, and the circumstances attending the procurement of the settlement and the signature of the defendant to the paper and all the surrounding facts shown in the affidavits and in the unprinted record, the defendant claims that the agreement to settle and not to further prosecute the appeal was procured by the fraudulent representations of the defendant's solicitor, and the concealment of the fact of the settlement of Lawrence & Chapin and Chase, Taylor & Co. with these complainants, and the arrangement of the harrow combination and the manner in which the complainants used the decree by advertising the same to the trade, and warning purchasers and users of harrows against buying any other harrow, and the employment of Mr. N. H. Stewart by these claimants, and by the harrow combination, establishes the fact that this decree was obtained by fraud practiced by the complainants and by the aid and connivance and assistance of the defendant's solicitor, and the settlement was procured in the same way.

Mr. Hunt, upon discovering the fraud, notified complainants of his disaffirmance and continued his business. (*See Hunt's affidavit.*)

Messrs. Childs & Co.'s harrow is involved in this case. It is an exhibit in the case. The complainants claim that the decision involves this harrow. They would have brought suits against their cus-

tomers except for an injunction which restrained them. The patent is weak. The complainants knew this and when parties defend they withdraw their suits; they intend to use the decision to annoy farmers and prevent sale; they do not intend to allow a case to be heard on the merits; they could not have procured this decree but by fraud. A real controversy exists in this case and should be heard and decided by this Court. (*See Childs' affidavit.*)

I.

The agreement, decree, and bond, (Ex. 1, 2 "A" of the moving papers, pages 8–13 and 26,) are but copies of papers contained in the return on file in this Court, and to determine their pertinance to the question raised by the motion, will require this Court to examine the whole record in connection with the moving and opposing papers, in order to ascertain the truth; and there being sharp conflicts of evidence, a part of which is contained in the papers submitted on the motion, and a part contained in the record, the motion should stand over and be considered when the case is printed and taken up for final disposition by this Court.

This course seems to have been the uniform practice of this Court on like questions, wherein it has been held that the Court will not consider on a motion to dismiss, questions of dispute which require the examination of the record, until the case is taken up for argument or final disposition. This seems to be the uniform practice of this Court.

Minor v. Tillotson, 1 *How.* 287.

St. Louis N. B. v. U. S. In. Co., 10 *Otto*, 43.

175, U.S. 299,

172, U.S. 632, 666, 682.

II.

The motion should be overruled, as the record in this Court shows that all of the papers on file in the Court below, are returned. If the complainants have failed to file all the papers used on the hearing, in the Circuit Court, the appeal will not be dismissed for this reason. Such defect, if it exists, will appear to the Court when they come to dispose of the case on the printed record. And if there is not then sufficient before the Court to enable it to properly determine the question, it will then be time to move the Court for a *certiorari* or for an order to amend the return.

The Rio Grande, 19 *Wall.*, 178.
Hudgins vs. Windhamkemp, 18 *How.*, 530.
Berry vs. Green, 111 *U. S.* 789.

130 U.S. 623,

In this case, Chief Justice Waite says: "We cannot de-"termine what proofs will be considered when the cases are "brought on for hearing, and it will be time enough to apply "for a *certiorari*, to bring up those that were used below un-"der the stipulation when it is found that the record in the "case in which they were filed, is not likely to be here in sea-"son for use, in connection with the appeals. Motion to "dismiss overruled."

III.

This motion and the appeal is not brought within the rule laid down in *Lord vs. Veasie*, 8 *How.* 254; *Cleveland vs. Chamberlain*, 1 *Black*, 425; *American Wood Paper Company v. Heft*, 8 *Wall.*, 333–337.

(*a*). It is not claimed that there was not, in the Circuit Court, a real controversy. The claim is that Mr. Hunt, the manufacturer of the harrow in suit, and the person

who assumed the defence in this case and employed the solicitor, paid him, and paid the complainants' damages in full after the decree was entered, and before the appeal was taken, and that both Hunt and Shorden signed the agreement to acquiesce in the decree after it was rendered.

(*b*). The mere payment of damages to the complainants for the alleged infringements by Mr. Hunt, would not, of itself, prevent an appeal to this Court, or be a reason for dismissing the same.

Erwin vs. Lowery, 7 *How.*, 173.

In this case the Court says: "We take the rule to "be that, although a decree in equity is fully executed "at the instance of the successful party, he cannot com- "plain of his own voluntary act, if he does perform a "condition imposed upon him before he can have the "fruits of the decree, although the other party derive a "benefit from such performant. If it were otherwise, a "writ of error in such a case as the present or a decree "in equity might be defeated, after the writ of error or "appeal was sued out, or where there was no *super-* "*sedas*."

(*c*.) The question is, whether the agreement by which Hunt "acknowledged the validity of the said patent, "and is not in any way to further contest its validity, "either in the suit against Shorden, or in any other "proceedings." And substantially the same papers signed by the defendant, were signed under circumstances which render them inoperative against this appeal.

The claim is, that these agreements were procured by fraud practiced by the defendant's solicitor, with the aid and connivance of the complaints, upon both Hunt and Shorden. (*See affidavit of Hunt, Shorden, Childs and Risley.*)

It is stated in Mr. Stewart's affidavit, as follows: "And this deponent further says, having been engaged "on the defence of the questions involved in the suit, "and in other suits brought by these complainants "against manufacturers upon a large scale, of spring "tooth harrows, for seven or eight years, he had in his "possession all the data, records and material necessary "to be used on the defence of this case." (*Page* 20 *of the moving papers.*)

Mr. Hunt says in his affidavit, "that at the time of "the arrangement (referring to the employment of Stew-"art,) Mr. Stewart was engaged in defending suits "brought by these complainants against Lawrence & "Chapin, and Chase, Taylor & Co., and their customers, "for the alleged infringement of what is known in the "harrow trade as the Garver patent, which covered a "curved spring tooth, ... "and which said firms were making a vig-"orous defence to said patents, and deponent believed "that Mr. Stewart could better defend this suit on ac-"count of his knowledge of the patent mentioned in the "complaint in this action, and hence deponent procured "Mr. Stewart to defend this suit." (*See Hunt's oppos-ing affidavit.*)

Mr. Stewart does not pretend, in his statement of the matter, that he informed Mr. Hunt that he had or intended to enter into a stipulation (Ex. 1), to hear the case on *ex parte* affidavits before Judge Gresham, and Mr. Hunt says that he did not know of it until informed in January, by Edwin H. Risley.

Mr. Stewart had secretly arranged a settlement of the extensive litigations between these complainants and Lawrence & Chapin and Chase, Taylor & Co., and had engineered and accomplished a combination consisting of five firms, prior to the 6th of December, 1888, (See affidavit of Risley,) when the stipulation to hear the case in two days, and Mr. Hunt says, "all of which, "(the settlement and combine) was kept from him

by the said Stewart," and was unknown to him when he signed the agreement. It is very clear that Mr. Stewart procured the defendant's signature to the paper upon positive misstatements of facts, and without doubt was employed and paid to do this, by the complainants themselves. These agreements, (of settlement) it is submitted, are brought directly within the rule laid down in

Story's Eq. Jr., §§ 310 *to* 313.

It is submitted that the onus of showing good faith is upon the complainants and Stewart, and to affirmatively show that the agreements signed by Mr. Hunt and Mr. Shorden in ignorance of the settlement and combination were fair, and signed with a thorough knowledge of all the facts which would have affected their action, and it is equally clear that neither of them knew that Lawrence & Chapin and Chase, Taylor & Co. had entered the combine and settlement of their pending cases.

Mr. Stewart, on the 19th and 20th of November, was trying to induce Messrs. Childs & Co. to enter a combination with these complainants, and Lawrence & Chapin and Chase, Taylor & Co.

(*See Childs' and Risley's affidavits.*)

Mr. Stewart and Mr. Reed informed Mr. Risley, prior to the 6th of December, 1888, that a settlement of all pending suits and a combination had been formed betweeen the complainants, Lawrence & Chapin, and Chase, Taylor & Co.

(*See Risley's affidavit.*)

Mr. Stewart informed Mr. Risley, in the interview, that something detrimental to Messrs. Childs & Co. would happen soon, but declined to say what it was.

Soon after the decree in this case was made, members of the combine tried to get Messrs. Childs & Co. into the same. These complainants informed Mr. Childs

that all suits had been settled with Lawrence & Chapin and Chase, Taylor & Co.

(*See Childs' affidavit.*)

One of the complainants informed Mr. Risley of the settlements, prior to December 6, 1888.

(*See Risley's affidavit.*)

It was highly improper for Mr. Stewart to have stipulated to remove the case from Indiana to Chicago, and to stipulate to go to final hearing on *ex parte* affidavits, without consulting Mr. Hunt, who was then defending the case. Hunt says he did not know of the stipulation until informed in January last.

(*See Hunt's affidavit.*)

What ought to be said about Mr. Stewart's conduct in bringing on the case, when it could not be moved by complainants, knowing that Lawrence & Chapin and Chase, Taylor & Co. had not only settled all their suits, but had formed a secret business combine with other strong houses, without disclosing it to Mr. Hunt.

This Court will say whether or not such was fair to the client.

The complainants wanted defendants' signature and agreement to not farther contest the case. They tried to get Mr. Hunt to get it. He refused. Mr. Stewart then procured it by misstatements.

(*See Hunt's and Shorden's affidavits.*)

If Mr. Shorden is to be considered the real and not the nominal defendant, then it was Mr. Stewart's duty as his attorney, to have informed him of the settlement between the complainants and Lawrence & Chapin and Chase, Taylor & Co., and of this combine.

No one will seriously contend that Mr. Hunt would have settled or paid damages, and sold out his business if he had known all the facts. When they were made known to him, he resumed and continued his business of selling spring tooth harrows.

(*See Hunt's affidavit.*)

We submit that it was Mr. Stewart's duty to disclose all the facts to his client. Failing in this duty and taking advantage of his client's ignorance and procuring his signature to the settlement, renders it void.

These complainants were parties to the fraud. Since its consummation, Mr. Stewart has been in their employ.

(*See Hunt's and Risley's affidavits.*)

Under all the circumstances shown in the unprinted record and in the opposing affidavits, it is submitted that the only reasonable interpretation of the transaction is that Mr. Stewart, his clients, Lawrence & Chapin, and Chase, Taylor & Co. and these complainants, entered into a secret settlement with the arrangement that Mr. Stewart should expedite this case so as to enable them to get a decree at an early date, to be advertised to the trade, to defeat competition, and to drive out other weaker manufacturers by preventing sales, and to contract the effect of the dismissal of the bill of complaint in the suit against Childs & Co., and to induce the latter firm to come into the combine. This is strongly to be inferred, by the extensive advertising of the decree, and claiming that Judge Gresham had sustained the patent and all other spring tooth harrows were an infringement. The whole transaction seems to be a rank fraud.

Judge Gresham granted this decree, supposing the case in which he had held the patent valid was on appeal to this Court, (*See Risley's affidavit.*) In fact it had been settled.

IV.

The appellees rely upon the defendant's agreement to acquiesce in the decree to dismiss this appeal.

The defendant shows, in opposition to the motion, that his signature and Hunt's also, were procured under misapprehension, which amounts to a fraud upon both of them, and for this reason it should not be enforced.

In any event, this Court, we think, should set aside or disregard the papers. These complainants paid the defendant nothing. He received nothing from any one. There is nothing to restore. As to him, there is no consideration for the stipulation.

If this motion is to be considered the same as though Mr. Hunt was the actual defendant, then his notice to the complainants, that he would disregard the agreement, and then proceeded with the harrow business the same as before, the complainants cannot object. They got the the property mentioned in clause 3 of the agreement at much less price than its actual value. (*See Childs' affidavit.*) They immediately disposed of it in the market. (*See Hunt's affidavit.*) They cannot make restitution of that property. An offer of restitution is unnecessary where the parties cannot be placed *in statu quo*. They have one thousand dollars of Hunt's money paid on account of damages for alleged infringements. They cannot object, because they did not repay it. The agreement to acquiesce in the decree embraced in clause 2d of the agreement, is independent from the other two clauses. To rescind the second clause of the agreement only required notice to do so on the part of Mr. Hunt, which was given. The complainants cannot be injured if this Court

affirm the decree; then infringers will stop. If it reverses the same, then complainants will have no ground of complaint. To enforce the stipulation as to either Hunt or the defendant, under the circumstances, would work a great injustice.

This Court has ample power summarily to either vacate the stipulations, or to disregard them, and to hear this appeal upon its merits.

The Hiram (Prize) 1 *Whea.* 440.
Walden v. Skinner, 11 *Otto*, 557 *and cases cited.*
Barry v. Mutual Life Ins. Co. 53 *N. Y.*, 539.

Courts of equity, upon application in a summary manner, without awarding an issue, have always exercised jurisdiction over all settlements or papers in a pending case, which were procured by either mistake or fraud, and have frequently exercised, or under circumstances where their enforcement would work a wrong jurisdiction by vacating or disregarding agreements on summary motion.

Lister v. Mundell, 1 *Bos. & Pull.* 428.
Buck v. Farralt, 2 *P., Wms.* 242.
Bebee v. B. N. Y. 1 *John. (N. Y.)* 530.
Ferris v. Crawford, 2 *Den. (N. Y.)* 595–604.

In the last case, Chief Justice Bronson says: "It was only a refusal to give effect to a release

" obtained by bad means, to be used for bad " ends.

" A good deal was said on the argument, "about setting aside a release on motion, in- " stead of awarding an issue to try its validity. " There is no doubt that a release may be set " aside or cancelled on motion. It has been " done repeatedly. This is abundantly proved " by the cases cited at bar ; and as to awarding " an issue, this is not according to the usual " course of the Court of Chancery. The " Court adjudicates upon the questions of fact " as well as of law ; and fraudulent deeds and " even judgments for fraud without the aid of " a jury. And, finally, the vice chancellor was " not asked to set aside the release, nor has it " been set aside by the chancellor. It is in as " full force now as it ever was. The chancellor " has only refused to give effect to the release ; " and it would be strange indeed, if any court " could not do that, when an instrument ob- " tained by wicked means for wicked ends, is " brought forward as the ground for either " making or opposing a motion."

The stipulations contained in the moving papers were procured by wicked means, to accomplish a wicked end, and it is submitted that they ought not to be recognized by this Court or the appeal dismissed.

By disregarding the agreements, this Court will leave the parties in the same position that they were when the papers were signed. If these complainants are damaged, let them sue Mr. Hunt for a breach of the agreement.

V.

If any doubt exists in the mind of the Court as to the good faith of the settlement, we think it should grant an order to show cause and allow the defendant to establish the invalidity of the settlement, by depositions taken under the ordinary Equity Rule, within the doctrine laid down in *The American Wood Paper Company v. Heft*, (8 *Wallace*, 333–337,) and should reserve the case until these depositions are filed and printed, and the Court put in possession of all the facts.

VI.

Within the rule laid down by this Court in *The American Wood Paper Co. v. Heft*, (8 *Wal.* 333-337,) Messrs. Hunt and Childs should be allowed to intervene and prosecute this appeal, as the decree from which the appeal is taken seriously affects their substantial interests. In such cases, this Court has allowed parties whose interests were affected, to intervene and present the facts to the Court, in order to enable it to do justice between the parties. Within the principle laid down in the above case, if it appears satisfactory to the Court that a real and substantial controversy exists between these complainants and the defendant of record, and those who have assumed the conduct of this appeal, then we think the Court should allow this appeal to stand and be heard upon its merits. The unprinted record in this case clearly presents the only question to be decided, to wit: whether the flat band iron used in the defendants' harrow is the equivalent of clip "D" mentioned in the patent.

(*a*). The decree from which this appeal is taken seriously affects Ira J. Hunt, who assumed the defence of this action in the Court below. He says in his affidavit, "that after learning of the harrow combination before "referred to, he decided to continue manufacturing and "selling spring tooth harrows, and so notified com- "plainants and is now engaged in that business."

(*See last part of Hunt's affidavit.*)

(*b*). J. M. Childs & Co. should be allowed to intervene and prosecute this appeal, as the decree seriously affects their property and interest.

Mr. Childs says amongst other things, in his affidavit, that, "The harrows manufactured and sold by de- "ponent's firm are claimed by these complainants to "be an infringement upon patent in suit, within the "decision of Judge Gresham in this case; and injunc- "tions based upon the decree appealed from, have been "granted by judges Brown and Severence of Michigan, "each of whom, as deponent is informed and verily "believes, based his decisions upon the decree in this "case, and the owners of the patent in suit for "more than six months past have been ready to "bring, and intended to bring and prosecute nu- "merous suits against the customers of deponent "in the different Circuit Courts of the United States, "throughout the New England and Middle States, "where deponent's firm is now marketing their harrows, "and would have done so, but that deponent's firm "obtained an injunction restraining the bringing of "suits against deponent's customers, which injunction "order was vacated about ten days since, and deponent "verily believes that suits will be brought against his "customers and applications made for injunctions "wherein the decision of Judge Gresham in this case, "if followed by the Circuit and District Judges, are "likely to result in injunctions and work irreparable "injury to deponent's trade, although it may ultimately "be established that the harrow manufactured by de- "ponent's firm is not an infringement, and that inas-

"much as the decree in this case and the record, pre-
"sents all of the questions which can be alleged against
"the patent in suit, deponent asks that he be allowed
"to intervene and prosecute this appeal, upon the ground
"that a real controversy exists."

In view of this statement, this Court will readily see that the decree granted in this case, notwithstanding the attending circumstances under which it was procured, standing as it does as a decree of the Circuit Court, should be considered by this Court on this appeal, and a decision rendered herein, to the end that a vast amount of litigation may be avoided and the expense saved.

(*c*). If this Court shall find, when it comes to pass upon the case, having the printed record before it, that the record does not sufficiently present the questions sought to be passed upon in this Court, it will then be time for the Court to bring up such additional records as the stipulation embraces: to the end that it may have before it, such facts and records as will finally present the question upon which the judgment of this Court is asked.

VII.

The cases cited by the complainants on this motion are not applicable to this case. Here there is a real controversy represented by counsel. The Court will not dismiss unless they conclude that the settlement was fair, honest and executed under circumstances which the Court holds is binding on the parties. Unless this is found there now exists a real controversy.

LASTLY.

For the reasons above stated, the motion to dismiss the appeals, should be refused.

EDWIN H. RISLEY,

Solicitor and of Counsel for the defendant,

Utica, N. Y.